Petition

81-1486

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
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NO. A-598

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DAVID J. FRIEDLAND
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED*

1. Whether petitioner was denied his Constitutional right to a trial by jury by the court's instruction which permitted the jury to find guilt under 18 U.S.C. § 1954 if petitioner received money merely for the stated purpose of influencing, regardless of his capacity to influence or his actual influence over, the grant of a pension fund loan.

2. Whether by amending the indictment the government deprived petitioner of his rights to due process of law, indictment by the Grand Jury and notice of the nature of the charges.

3. Whether petitioner was entitled to a severance of the tax count involving the Swiss bank account because that evidence was not admissible on the conspiracy, labor bribery, Travel Act and obstruction counts.

4. Whether petitioner was denied due process of law by the court's failure to hold an evidentiary hearing to determine the circumstances of the destruction of records which had been admitted by in the possession of the government.

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*Jacob Friedland, except for the parties named in the caption, is the only other party to the proceeding in the Court of Appeals for the Third Circuit.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, David J. Friedland, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on October 1, 1981.

OPINION BELOW

The opinion of the Court of Appeals is reported at 660 F. 2d 919 (3d Cir. 1981) and appears in the Appendix hereto. The District Court for the District of New Jersey entered no opinion.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on October 1, 1981. The timely Petition for Rehearing or Rehearing In Banc was denied on November 10, 1981, and this Petition for Writ of Certiorari was filed within the time prescribed by the rules, as extended by Order of Associate Justice Brennan on January 5, 1982. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article III, Section II:

> The trial of all crimes . . . shall be by jury.

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law.

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 201. Bribery of public officials and witnesses

(a) For the purpose of this section:

"official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act;

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him:

Shall be fined. . . or imprisoned . . . or both.

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or

commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. § 1954. Offer, acceptance, or solicitation to influence operations of employee benefit plan

Whoever being—

(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan;

(2) an officer, counsel, agent, or employee of an employer or an employer of any of whose employees are covered by such plan; or

(3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or

(4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of the actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money or thing of value prohibited by this section, shall be fined not more than $10,000 or imprisoned

not more than three years, or both. Provided, that this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as such agent, or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

As such in this section, the term (a) "any employee welfare benefit plan" or employee pension benefit plan" means any employee welfare benefit plan or employee pension benefit plan, respectively, subject to any provision of title I of the Employee Retirement Income Security Act of 1974, and (b) "employee organization" and "administrator" as defined respectively in sections 3(4) and 3(16) of the Employee Retirement Income Security Act of 1974.

26 U.S.C. § 7206. Fraud and false statements

Any person who—

(1) Declaration under penalties of perjury. Wilfully makes and subscribes any return statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter.

29 U.S.C. § 1105 (c) and (d). Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities

(c)(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that—

(A) the named fiduciary violated section 1104(a)(1) of this title—

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a) of this section.

(3) For purposes of this subsection, the term ''trustee responsibility'' means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 1102(c)(3) of this title.

STATEMENT OF THE CASE

On October 22, 1979, petitioner, David J. Friedland, and his father, Jacob Friedland, were charged in an indictment returned by the Grand Jury for the District of New Jersey, with one count of conspiracy to solicit and receive kickbacks in violation of 18 U.S.C. § 371; two counts of soliciting and receiving kickbacks while counsel of an employee pension benefit plan in violation of 18 U.S.C. § 1954; one count of traveling and causing to travel with intent to promote and facilitate bribery in violation of 18 U.S.C. § 1951 (the Travel Act); and one count of obstruction of justice in violation of 18 U.S.C. § 1503. On January 28, 1980, a superseding indictment was returned which, in addition to the above violations, charged petitioner and his father[1] with two counts each of making and subscribing to false income tax returns in violation of 26 U.S.C. § 7206(1).

Prior to trial, petitioner moved to dismiss the kickback and Travel Act counts on the ground that by failing to allege any duty, decision or action on petitioner's part as the basis for the payment of the kickback an essential element of the crimes had been omitted. Petitioner also moved to dismiss those counts, as well as the obstruction of justice charge in count 5 because they were not pleaded specifically enough to be met or to prevent double jeopardy. Pursuant to Fed. R. Crim. P. 14, petitioner moved to sever the tax counts from the first five in order to prevent prejudice from the joinder. All these motions were denied.

After a trial before District Judge H. Curtis Meanor and a jury, petitioner was found guilty of all relevant counts of the indictment. On June 9, 1980, petitioner was sentenced, in sum, to consecutive terms of three and four

[1]Hereafter, the use of the term "petitioner" shall include petitioner and his father, Jacob Friedland, unless there is some need to refer specifically to one or the other. Jacob Friedland intends to file a separate Petition; he is the only other party, besides the government, to this case.

years imprisonment and fines in the amount of $35,000. On October 1, 1981, the United States Court of Appeals for the Third Circuit filed an opinion affirming the conviction and on November 10, 1981, the Third Circuit denied petitioner's Petition for Rehearing or Rehearing In Banc.

The evidence adduced at trial indicated that petitioner and his father were attorneys who served for many years, up to and including 1976, as general counsel to the pension fund maintained by Teamsters Local 701 in New Jersey. That fund was an employee benefit plan within the meaning of 18 U.S.C. § 1954 and its assets were managed by Unicorn Pension Management Associates ("Unicorn"). In support of its indictment, the government relied primarily on Barry Marlin, a swindler of epic proportions who had mulcted Local 701's pension fund of approximately $4 million through two loans granted by the pension fund's outside investment advisors.

By the mid-1970's when Marlin, a California attorney and businessman, met petitioner, Marlin had run a gargantuan Ponzi scheme up to $49 million which had been obtained from numerous investors. Marlin was introduced to petitioner by Kate Edelman, whom Marlin met in December 1974 and married in July 1975. During the spring of 1975, Marlin was seeking financing for Dunhill Brown Corporation, a company of which he was sole stockholder. During Marlin's first meeting with petitioner, he learned that petitioner was connected with a client who might lend $3.5 million to Dunhill Brown, but Marlin expressed no interest in such a loan at that time. When Marlin's financing from other sources fell through, he approached petitioner to be put in contact with the client who had money to lend; this turned out to be the pension fund. Marlin testified that petitioner informed him of the terms a loan would be granted under and requested a finders fee or commission. The commission, amounting to $315,000, was to be paid in cash withdrawn from the First Kensington Bank of the Cayman Islands, an offshore bank Marlin owned. Marlin claimed that both

petitioner and his father warned him that the loan had to be made on a business-like basis and that it was possible it could be renewed at the end of the two-year term; petitioner also insisted that none of the commission was to be paid from the loan funds if the loan was obtained.

Thereafter, Marlin was introduced to the principals of Unicorn to whom he made a presentation in support of his loan. Marlin was required to meet with Douglas and his partner, Walter Peters, again to further justify the loan. In early April, when Marlin became apprehensive about the loan, he received assurances from petitioner that the loan would be granted. He claimed that petitioner told him that he was certain of this because if Unicorn did not give Marlin the loan, petitioner would take the fund away from Unicorn. Sometime later, Marlin learned through petitioner that the loan had been approved and that the closing would occur on April 25, 1975. He claimed that petitioner wanted the finders fee paid simultaneously with the closing and at a location outside the United States, preferably petitioner's condominium in Freeport, Bahama.

In the meantime, Marlin accumulated large amounts of money ostensibly to pay the commission. He claimed that he took the cash from New York directly to petitioner's condominium in the Bahamas where he dumped it on the floor and they counted it. On Edelman's direct examination, the government prosecutor elicited false testimony from Edelman that supported Marlin's claimed itinerary. On cross-examination, when confronted with her prior grand jury testimony and interviews, Edelman admitted that her testimony on direct was not true, but that Marlin had told her he went first to the Cayman Islands, where he controlled the First Kensington Bank, and then about his other business. This version of Marlin's trip coincided with Edelman's previous testimony under oath.

After this first loan had been obtained, Marlin sought numerous other loans from the pension fund. These applications were made to Unicorn, which had become the

outside investment manager for the pension fund. Under their agreement the trustees of the fund delegated authority with respect to investments made on behalf of the fund; the trustees could, of course, terminate the contract. The investment manager for Unicorn testified that there was no influence exerted nor attempted to be exerted and that he evaluated the Marlin loan application for Dunhill Brown on its merits and concluded that it was a prudent investment, which it would have been had not Marlin looted the company. Of the five later loan applications that Marlin submitted, Unicorn rejected four and granted one, all such evaluations being made on the merits of the particular application with no outside influence. Indeed, petitioner gave no legal advice to the investment manager; all legal advice was obtained by the investment manager from the firm of Baker & McKenzie, a 500 attorney, multinational law firm.

In July 1975, Marlin claimed that the Friedlands expressed dismay that their Swiss bank account, which contained over $1 million, was earning a very low interest rate. At that time, Marlin agreed to assist the Friedlands in obtaining a higher interest rate by running the money from the Swiss bank account through his First Kensington Bank for ultimate investment in certificates of deposit in Great Britain. Marlin testifed that he gave the details of the Swiss bank account, which he also testified was not contemplated to have been used in any of the deals involved in this indictment, to Max Cohen, his assistant in Great Britain. Cohen arranged for the million dollar transfer from Switzerland to the First Kensington Bank and purchased the certificates of deposit as he had been instructed.

After the first five-count indictment in October 1979, the government obtained the bank account records from Switzerland under the Mutual Assistance Treaty and returned a superseding indictment adding four counts of tax evasion. The first two counts involved the failure to report the commissions received from Marlin and the second two, counts 8 and 9, were predicated on the receipt of

interest in the Swiss bank account through the First Kensington Bank transaction. Thus, the swindler's testimony—obtained through a sharp reduction in his sentence—and the sinister-appearing international financial machinations involving the Swiss bank account, along with the inability of the Friedlands to testify concerning the kickback allegations without being cross-examined on the Swiss bank account information, resulted in the conviction of petitioner on all relevant counts of the indictment.

REASONS FOR GRANTING THE WRIT

I. PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO A TRIAL BY JURY BY THE COURT'S INSTRUCTION WHICH PERMITTED THE JURY TO FIND GUILT UNDER 18 U.S.C. § 1954 IF PETITIONER RECEIVED MONEY MERELY FOR THE STATED PURPOSE OF INFLUENCING, REGARDLESS OF HIS CAPACITY TO INFLUENCE OR HIS ACTUAL INFLUENCE OVER, THE GRANT OF A PENSION FUND LOAN.

It is well established law that there is a denial of due process, as well as the right to trial by jury, where the practical effect of an instruction is to withdraw from the jury the determination of an essential element of the offense. As the Court explained in *In Re Winship*, 397 U.S. 358, 364 (1969), "the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Cf.*, *Cupp* v. *Naughten*, 414 U.S. 141 (1974) and *Henderson* v. *Kibbe*, 431 U.S. 145 (1976). *See, United States* v. *Short*, 493 F.2d, 1170, 1172 (9th Cir. 1974), *Casella* v. *United States*, 449 F.2d 277 (3d Cir. 1971), and *Merrill* v. *United States*, 338 F.2d 763 (5th Cir. 1964).

The court instructed that to convict petitioner under 18 U.S.C. § 1954, the jury must find that petitioner receiv-

ed or agreed to receive or solicit a thing of value because of or with intent to be influenced with respect to any of his actions, decisions or other duties relating to any question or matter concerning the Local 701 Pension Fund. The court explicated those instructions in the following manner:

> The evidence need not establish that the defendants had the actual formal legal power to effect or secure . . . the loan . . . Furthermore, you need not find the defendants actually influenced the granting of the loans to find they received the cash payments because of their actions, decisions, and duties relating to the loans, *so long as such influence was the stated purpose in receiving the cash.* (Emphasis supplied.)

Citing *United States* v. *Niederberger*, 580 F.2d 63 (3d Cir.) *cert. denied* 439 U.S. 980 (1978), the Court of Appeals found that the trial court was correct:

> . . . in not requiring that any action actualiy be taken in order for the jury to find that the kickback was received "because of" actions, decisions or other duties relating to the Fund. So long as appellants were counsel to the Fund and received the kickback (a) because of that status which gave them at least ostensible power to exercise influence or (b) with the purpose of exercising the influence they either actually or ostensibly had over decisions regarding the Fund, then they need not be shown to have actually exercised such influence.

A review of the language, derivation and legislative history of § 1954 reveals that the receipt of money merely for the stated purpose of influencing was not the evil sought to be prohibited by the "because of" prong of § 1954.

The need for legislation regulating the investment and disbursement of assets in welfare and pension plans has been well established in human experience and

legislative hearings. In considering the Welfare and Pension Plans Disclosure Act Amendments of 1961, the Senate Committee on Labor and Public Welfare concluded that "perhaps the greatest single abuse in the administration and operation of these plans is the kickback or payoff to influence the investment of the assets of the funds," Senate Report No. 908, 87th Cong. First Sess. 1961, p. 16. Accordingly, the new § 1954 of Chapter 95 in Title 18 of the Code was proposed making it a crime for persons having fiduciary responsibility to receive or agree to receive a thing of value because of any actions taken or to be taken in the administration of the plan." *Ibid*, p. 21. This language which was essentially incorporated in the final version of § 1954 combines the prohibitions against bribery found in 18 U.S.C. § 201(c) with the prohibitions against receipt of gratuities in § 201(g)[2].

Although the respective prohibitions of § 1954 and §§ 201(c) and (g) are similar, the purpose of § 201, unlike the purpose of § 1954 "... is to preserve the integrity of official action of direct and indirect corruption" in recognition of the fact that all bribes of public officials have potentially equivalent corruptive impact on the public service, regardless of the efficacy of the bribe. Staff Report on Federal Conflict of Interest Legislation, Subcommittee No. 5, of the Committee on the Judiciary of the House of Representatives, 85th Cong. Second Sess. (March 1, 1958) p. 70. Thus, it is clear that the Federal anti-bribery legislation is directed at the preservation of the integrity of the system, whereas the objective of § 1954 is to prevent the depletion of the assets of a labor union's pension fund by payoffs to decisionmakers; that is, § 201 is process-oriented and § 1954 is result-oriented.

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[2]§ 201(c) makes criminal the solicitation or receipt of a thing of value by a public official "... in return for 1) being influenced in his performance of any official act...." § 201(g) makes criminal the solicitation or receipt by a public official of "... anything of value for himself for or because of any official act performed or to be performed by him."

Because of this difference in objectives, the more sweeping construction given to the enforcement of § 201 which the Third Circuit applied in *United States* v. *Niederberger, supra*, should not be applied to § 1954. Here, petitioner did not come within the class of persons covered by § 1954(c) since the outside investment advisor, Unicorn, had been delegated investment authority and petitioner had no authority with respect to the actions, decisions or other duties of that investment advisor.[3] There was no official act with respect to the loan which the petitioner performed or which he could have performed. Accordingly, he was in no position to use any authority or influence in a manner which could have affected the Marlin loans.

Even assuming that a *Niederberger*-type analysis is applicable to § 1954, petitioner submits that the court's interpretation does not permit conviction of petitioner here without the demonstration of some nexus between his receipt of the money and the action sought by the donor. *United States* v. *Niederberger, supra*, explains the difference between the *quid pro quo* requirement in § 201(c)(1) and its absence from § 201(g). During the period when Niederberger was serving as an Internal Revenue case manager for Gulf Corporation audits, he accepted five golfing junkets from Gulf for which he was convicted of violations of § 201(g), *Ibid.*, p. 65. The Third Circuit quickly scotched Niederberger's contention that the gratuities had to have been generated by some specific, identifiable act. However, far from holding that the receipt for a stated purpose was sufficient, the court explained that

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[3]The extension of § 1954 to persons neither exercising nor able to exercise influence over the actions of a pension fund would jeopardize the insulation from liability granted to trustees by Congress under ERISA, 29 U.S.C. § 1105(c)(2) which permits a total delegation, as occurred here, of control over the investment of fund assets. The apparent conflict between ERISA and the court's instruction here is especially perilous for attorneys such as petitioner, who could expect to rely on ERISA for insulation from liability.

> What is proscribed, simply put is a public official's receipt of a gratuity, to which he was not legally entitled, given to him in the course of his every-day duties, for or because of any official act formed or to be performed by such public official and he was in a position to use his authority in a manner which could affect the gift giver. *See, United States* v. *Alessio*, 528 F.2d 1079 1082 (9th Cir. 1976), *United States* v. *Brewster*, 506 F.2d 62 (D.C. Cir. 1974).

Accordingly, it is manifest that the receipt of a thing of value by counsel to a pension fund without any proof of a nexus between that receipt and any action, decision or duties taken or to be taken or even which could have been taken by that official cannot support a conviction under § 1954 even if the stated purpose of such receipt was to influence an action. If *Niederberger* is interpreted as the Third Circuit suggests[4] it is in clear conflict with *United States* v. *Muntain*, 610 F.2d 964, 966-968 (D.C. Cir. 1979). Muntain, an Assistant Secretary for Labor Relations with HUD, received payments for influencing HUD employees to purchase certain automobile insurance policies. In reversing the conviction, the D.C. Circuit held that although Muntain, in fact, influenced the employees because he had been in a high position at HUD and received money therefor, there was no nexus between the actions performed or to be performed and his official duties.

Here, the Friedlands had no demonstrated capacity to influence the award of the loans nor were they shown to have exercised any indirect or informal influence as in

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[4]In all of the *Niederberger* line of cases, there is found some power or capacity in the official to perform or to influence in order to sustain a conviction. Here there was no such showing. *E.g., United States* v. *Evans*, 572 F.2d 455 (5th Cir. 1978); *United States* v. *Carson*, 464 F.2d 424 (2d Cir. 1972); and *United States* v. *Heffler*, 402 F.2d 924 (3d Cir. 1968). *See, United States* v. *Brewster*, 506 F.2d 62 (D.C. Cir. 1974) (thorough explanation of differences among a bribe, a gratuity and a campaign contribution).

United States v. *Palmeri*, 630 F.2d 192 (3d Cir. 1980). Their conviction was founded merely upon the "stated purpose" as instructed by the court. Since such "stated purpose" is not sufficient to require the jury to find that the receipt was for or because of an official action, the court's instruction embodying that concept was erroneous and effectively withdrew the fourth element of § 1954 from the jury in violation of petitioner's rights under the Due Process Clause.

Although the Court of Appeals purported to uphold the "stated purpose" instruction on the basis of its analysis of § 201 as explained in *United States* v. *Niederberger, supra*, it should be noted that the particular language objected to—that no actual influence need be found so long as such influence was the stated purpose in receiving the payments—was derived from *United States* v. *Mazzei*, 521 F.2d 639 (3d Cir. 1975) (en banc) a Hobbs Act (18 U.S.C. § 1951) prosecution upon which the government relied in its request to the trial court for instructions. The Hobbs Act prohibits the obtaining of property by any of the following: "Wrongful use of actual or threatened force, violence or fear or under color of official right." In *Mazzei*, the Third Circuit construed the term "under color of official right," to include the receipt of payment by a public official for the stated purpose of influencing a governmental decision without requiring that the prosecution show actual extortion—as had been required in earlier Hobbs Act cases, *e.g.*, *United States* v. *Addonizio*, 451 F.2d 49 (3d Cir. 1971), *cert. denied* 405 U.S. 936 (1972). The *Mazzei* case represents the most extreme example of the plasticity of construction given the Hobbs Act in the Third Circuit.

Mazzei was predicated on the seminal case of *United States* v. *Kenny*, 462 F.2d 1205 (3d Cir. 1972) which revolutionized the interpretation of the Hobbs Act. From *Kenny*—a 2-1 panel decision reversing years of consistent interpretation of the Hobbs Act as requiring the extortion to be accomplished by force, threats or fear—the Third Circuit progressed to *Mazzei* which was used by the trial

court here to justify the "stated purpose" instruction. Thus, the Third Circuit's imaginative extension of the Hobbs Act has jumped its retaining wall into a gratuity case; that leap was disguised by the Third Circuit under the *Niederberger* rubric[5].

A review of the cases under § 1954 demonstrates that the theory of the Third Circuit—the *Mazzei- Niederberger-Friedland* progression permitting conviction on merely a "stated purpose"—is not supported by any other authorities. All cases interpreting this aspect of § 1954 except one—*United States* v. *Marroso*, 250 F.Supp.27 (E.D.Mich. 1966)—have turned upon a finding that actual influence had been exercised by the persons charged.

In *United States* v. *Russo*, 442 F.2d 498 (2d Cir. 1971), defendant Wenger rendered informal advice to the pension fund on a regular basis and was instrumental in influencing the award of the loan. The court found that because he influenced the loan and because he rendered advice, he held the position of "counselor" with respect to the employee benefit plan for purposes of prosecution under § 1954. *See also United States* v. *Dorfman*, 470 F.2d

[5]The "color of official right" progression of the Third Circuit has received considerable criticism even when restricted to the Hobbs Act. A recent example of such cogent criticism is found in Judge Aldisert's dissent in *United States* v. *Cerilli*, 603 F.2d 415 (3d Cir. 1979). *See, Ruff, Federal Prosecution of Local Corruption: A Case Study in the Making of Enforcement Policy*, 65 Georgetown L. J., 1171, 1183 (1977). Judge Aldisert notes that both *Kenny* and *Mazzei* were 2-1 panel decisions, which were never considered *en banc*. Judge Adams, concurring in *Cerilli*, noted that the *Mazzei* point weighed by the dissent was not presented in the trial court nor was it argued in this court and he suggested reconsideration. "If a panel of this court is to resolve a criminal appeal on the basis of its answer to this question, it seems unwise, at least to me, to fail to give the party an opportunity to address it. For an appellate court to decide an important matter such as the present one, *sua sponte*, without the benefit of argument by counsel is, I believe, neither in the interest of the parties nor the judicial system." *United States* v. *Cerilli*, 603 F.2d at 426. However, in *United States* v. *Friedland*, Circuit Judge Adams also concurred, but did not raise the same objection despite the fact that, as in *Cerilli*, neither party mentioned the § 201 issue nor cited *Niederberger* or any other § 201 cases.

246 (2d Cir. 1972) (special counsel used his influence to place loan) and *United States* v. *Provenzano*, 613 F.2d 37 (2d Cir. 1980) (pension fund insider actually exerted influence to obtain loans in return for bribes).

Finally, in *United States* v. *Palmeri*, 630 F.2d 192 (3d Cir. 1981), the court was confronted with voluminous evidence of loans actually arranged by employees of Teamster's Local 945 in return for bribes. Brushing a claim that the employees lacked formal authority, the Third Circuit held that all who exercise control directly or indirectly, authorized or unauthorized, over the fund are within the class to be regulated and, if it is determined that they received things of value in return for influencing the award of a loan, they come within the ambit of § 1954.

Flen Chestnut, the *Palmeri* defendant whose predicament most closely resembles petitioner's and whose substantive and conspiracy count convictions were reversed, was a business agent for Local 945 and one of the major beneficiaries of the loan scheme. Although the court found he received significant amounts of money and was within the class regulated, there was no evidence to prove his participation in the scheme. The court stated Chestnut could not be held liable if, for instance, he received the loans merely because the principals in the scheme liked him or thought he needed money. 630 F.2d at 206.[6]

From the foregoing review, it is clear that no convictions under § 1954—until petitioner's—have been sustained where the actual use of influence has been absent. Accordingly, the instruction given below defies reason, established case law, legislative intent and due process of law; petitioner's conviction cannot be supported.

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[6]In the instant case the government merely introduced evidence that petitioner was in the class covered because he was counsel to Teamster's Local 901. It introduced no evidence to indicate that he had actually influenced or intended to influence the grant of the loan—that is, at most, he stated that he would influence the loan in return for money.

Certiorari should be granted on this issue in the instant case most importantly because the Friedlands' improper conviction caused them a deep personal tragedy. It presents a pattern of facts in which petitioner's father, a patriarchal figure from the New Jersey legislature and the labor union movement, and petitioner, the former House majority leader of the State of New Jersey and a State Senator until his conviction, were brought down on the word of a witness who was characterized by the trial judge as one of the most egregious swindlers in our nation's history.

Beyond that, it should be noted that over the past forty years union and public employee pension funds have grown so rapidly that they have become the biggest pool of private capital in the world. Indeed, one authority estimates that pension funds now own about 25 percent of the outstanding shares of stock in the United States and 40 percent of the bonds. Rifkin and Barber, *The North Will Rise Again* (Beacon Press, 1978). Since the investment of these staggering amounts of money will affect people who may be entitled to finders fees—which are not unusual rewards for those instrumental in placing or obtaining loans—decisions as to the propriety of advisors, counsel and agents' conduct in the context of 18 U.S.C. § 1954 will arise with increasing frequency. Since there are relatively few interpretations of 18 U.S.C. § 1954, and none particularly authoritative, it is important that definitive guidelines and interpretations of the statute be provided the great numbers of people affected by it.

The cases interpreting § 1954 have a flavor of expediency and seem primarily aimed at stamping out the particular evil at hand without regard to the coherent development of case law under § 1954. A review of the cases reveals that the *Friedland* decision approving the "stated purpose" instruction, is contrary to all extant decisions upholding convictions under § 1954 and is similar to *United States* v. *Marroso, supra*, in which a judgment of acquittal was entered. This extraordinary conflict with nearly all cases decided under § 1954 warrants

full, thorough and thoughtful review by this Court. As is apparent, there has been no such definitive ruling yet by this Court on § 1954.

Since conviction was permitted "so long as Friedland's influence was the stated purpose in receiving the cash payments," the *Friedland* case represents a pernicious extension of the *Mazzei* doctrine. This extension of *Mazzei*, if coupled with the holdings in other § 1954 cases, such as *Palmeri* and *Russo*, affirming convictions of low-level, non-decision-making union employees, and even non-employees who exercise some *de facto* agency power, will permit indictment and conviction of low-level union employees and non-employees who make representations that they are able to influence, despite their patent lack of influence, the granting of loans from pension funds. Such a holding, if allowed to stand, will trivialize § 1954 to the level of a three card monte statute. Furthermore, the significantly low "thing of value" criterion in § 201 prosecutions, *e.g.*, the offer of female companionship in *United States* v. *Haragy*, 457 F.2d 471, 473 (2d Cir. 1972), and indeed, the acceptance of golf trips in *United States* v. *Niederberger*, may be used in future § 1954 prosecutions.

Combining these three concepts, a violation of § 1954 could be made out by proof that a bragging, low-level union employee or non-employee hanger-on accepted female companionship furnished by a hopeful loan applicant. Although this specter may be characterized as unlikely, there is no barrier to such use of § 1954 so long as petitioner's conviction is not critically reviewed by this Court.

Finally, to the extent that this case interprets § 201 to mean that there is no requisite connection between the acceptance of the thing of value and the performance of some official act, there is an irreconcilable conflict with *United States* v. *Muntain, supra*.

Accordingly, because this is a nationally important case deeply affecting the economic wellsprings of the na-

tion and it represents a conceptually unwarranted extension of the Third Circuit's views on the Hobbs Act, permits the indictment and conviction of low-level union employees and non-employees contrary to the legislative intent of § 1954, and is in conflict with all previous decisions under § 1954 and, to the extent it is regarded as a bribery case, is in conflict with *United States* v. *Muntain*, petitioner submits that this Court should grant his Petition for Writ of Certiorari and ultimately reverse his conviction on all counts.

II. BY AMENDING THE INDICTMENT THE GOVERNMENT DEPRIVED PETITIONER OF HIS RIGHTS TO DUE PROCESS OF LAW, INDICTMENT BY THE GRAND JURY AND NOTICE OF THE NATURE OF THE CHARGES.

By drastically changing the basis of the charge in the principal counts of his indictment, the government deprived petitioner of his rights to due process of law, to be indicted by a Grand Jury and to be informed of the nature and cause of the accusation against him. The amendment by the government of the indictment in this case violated the principles assured by the Fifth and Sixth Amendments to the Constitution of the United States, as articulated by the Court in *Ex parte Bain*, 121 U.S. 1 (1887) and *Stirone* v. *United States*, 361 U.S. 212 (1960).

After exploring the function of the Grand Jury and the constitutional right to an indictment by that body, *Bain* held that after an indictment has been returned, its charges may not be broadened through amendment, except by the Grand Jury itself. The Court found that if the indictment was not the complete product of the Grand Jury, then the trial court lacked power to try and sentence the defendant.

The facts in *Bain* involved a charge of fraud with two victims, only one of whom was protected by the statute under which defendant was indicted. Had the case been submitted to the jury as it stood, a guilty verdict could

have been returned with respect to either victim; therefore the guilty verdict could not stand. *Cf.*, *United States* v. *Dansker*, 537 F.2d 40, 51 (3d Cir. 1976). The trial court in *Bain* cured this problem by striking the name of the victim who was not protected by the statute, thereby amending the indictment. Since this Court was unable to conclude that the Grand Jury would have indicted with respect to the protected victim alone, it held that the trial court was without jurisdiction to try the defendant. 121 U.S. at 10.

The *Bain* concept was explored in *Stirone* v. *United States*, 361 U.S. 212 (1960), in which the indictment alleged one basis for Hobbs Act jurisdiction and, at trial, the government, unable to prove that particular basis, proffered an alternative basis for jurisdiction; the Court found that to be an unconstitutional amendment of the Grand Jury's indictment. The Court held that by the offer and acceptance of proof on an element that had been charged in a substantially different manner by the Grand Jury, there was an impermissible and prejudicial amendment of the indictment. Because of the court's admission of evidence and under its charge the revised element might have been the basis upon which the trial jury convicted, there was fatal error. 361 U.S. at 219. Thus, the *Stirone* amendment was barred because it had the effect of undermining the notice function of the indictment, rather than effecting a withdrawal of jurisdiction from the court to try the defendant as in *Bain*. *See United States* v. *Milestone*, 626 F.2d 264 (3d Cir. 1980).

In the instant case, the indictment returned by the Grand Jury contained four counts which directly depended for their vitality upon petitioner's having violated 18 U.S.C. § 1954. More specifically, the indictment charged that petitioner had received money from Barry Marlin "because of and with intent to be influenced with respect to [his] actions, decisions and duties relating to questions and matters concerning the investment of the assets of the pension fund," i.e., the granting of the $3.5 million

loan charged in count 2 of the indictment. Counts 1, 3 and 4 are similar to or are based on this charging language.

The government amplified this language—which clearly links the receipt of money to actions, decisions and duties relating to the actual grant of the loan—in a series of pretrial proffers. In each proffer, in the government's opening statement, and throughout the trial of the case the government consistently contended that petitioner had actually influenced the grant of loans and it was successful in getting evidence admitted on that theory. It was not until the close of the evidence that the government changed the entire thrust of the case by requesting that the judge instruct the jury that it could return a guilty verdict if petitioner's receipt of payment was merely for the stated purpose of influencing the grant of the loan, regardless of whether petitioner had the capacity to act, to decide or had other duties relating to the loan.

Although petitioner contends in Argument I above that this instruction creates the converse of *Bain*—that is, the amendment here transformed the indictment from one that stated an offense into one that did not—even if an offense be found, petitioner was not informed of the nature of that offense until after all the evidence in the trial had been presented.

In *United States* v. *Marroso, supra,* 250 F.Supp. at 31, the government similarly failed to prove the allegations in the indictment and the bill of particulars, albeit they were more narrowly drawn than § 1954 itself. Although the proof might have made out a violation of § 1954, it was not sufficient to support the indictment as particularized, therefore the court entered a judgment of acquittal.

Petitioner's indictment as particularized places him in a position analogous to *Marroso.* Here, the government failed to prove (1) the use of or the intent to use actual influence; (2) the capacity to take actions, make decisions or perform other duties with respect to the loan; or (3) the

payment was received because of an action, decision or duty of petitioner with respect to the granting of the loan. The government's salvation was that the jury was permitted to convict if it merely found that petitioner had received the money with the stated purpose of influencing the loan. See *United States* v. *Summers*, 496 F.2d 723 (3d Cir. 1974) and *United States* v. *Prejean*, 494 F.2d 495, 497-98 (5th Cir. 1974).

Moreover, substantial prejudice to petitioner was created by the government's trying the case on the basis of actual influence and conspiring to influence; under this guise they were able to get in much evidence, such as the Swiss bank account, which could not have come in had the indictment as particularized been limited to proof merely of the stated purpose of the receipt of the money. *See, United States* v. *Camiel*, 519 F.Supp. 1238 (E.D.PA. 1981).

Accordingly, because the court permitted the government to recast the indictment to permit conviction on a finding of "stated purpose" to influence, rather than on a finding of actual influence or intent to influence as had been charged by the Grand Jury, petitioner was convicted under an indictment that was not returned by the Grand Jury. That conviction must be reversed.

III. PETITIONER WAS ENTITLED TO A SEVERANCE OF THE TAX COUNT INVOLVING THE SWISS BANK ACCOUNT BECAUSE THAT EVIDENCE WAS NOT ADMISSIBLE ON THE CONSPIRACY, LABOR BRIBERY, TRAVEL ACT AND OBSTRUCTION COUNTS.

The retention of counts 8 and 9 in this case through trial violated the joinder provisions of Fed. R. Crim. P. 8(a) and created the prejudice that Fed. R. Crim. P. 14 was designed to prevent. Those counts allege the receipt of unreported income derived from a Swiss bank account which admittedly was never used or connected in any way to the transactions underlying counts 1 through 7. Ac-

cordingly, there was misjoinder and severance of these two counts should have been granted.

The indictment reveals quite clearly that there is no interdependent series of substantive counts encompassed within the scope of the conspiracy charge in count 1 upon which joinder is normally hinged. For example, the indictment in *United States* v. *Sweig*, 441 F.2d 114 (2d Cir.), *cert. denied* 403 U.S. 932) (1971), charged a conspiracy to defraud the United States beginning in 1964 and continuing to the date of the indictment; it swept in a number of substantive counts of perjury during the grand jury investigation. *Accord, United States* v. *Haldeman*, 559 F.2d 31 (D.C. Cir. 1976). Thus, there is justification for the joinder of substantive counts which occur within the scope of a conspiracy and during its period of operation. In this case, however, the conspiracy count is alleged to have extended from January 1975 to December 1976, while counts 8 and 9 did not occur until mid-June 1977 when the Friedlands filed their tax returns. Therefore, the umbrella conspiracy justification for joinder is not present. See *United States* v. *Spector*, 326 F.2d 345 (7th Cir. 1963). *Compare, Blunt* v. *United States*, 404 F.2d 1283 (D.C. Cir. 1968) and *Bayless* v. *United States*, 381 F. 2d 67 (9th Cir. 1967) (lapse of hours or days between offenses may sustain joinder).

It is clear from the circumstances that the government deliberately sought to inject the aura of criminality inherent in coded Swiss bank accounts into this case to prejudice petitioner. As the trial court stated, "I cannot for the life of me see it was any part of count 1. It was an entirely separate and independent transaction in no way related to the conspiracy." The court ultimately concluded that there was no relationship between the Swiss bank account and any matters raised in the conspiracy count and that it was "atmospherically prejudicial," however, it declined to sever.

In summary, there was no testimony and nothing in the record from which an inference could be drawn that the Swiss bank account had to do with monies connected

with the financing of business ventures from the Local 701 Pension Fund. Moreover, this testimony was quite prejudicial to petitioner: he was unable to testify in defense of the first five counts of the indictment without opening himself up to cross-examination on the Swiss bank account evidence. There is little doubt that as soon as the secret Swiss bank account containing $1 million was linked with petitioner, the jury viewed petitioner with a jaundiced eye. In addition, it piled on the charges in the indictment making petitioner look like a multiple offender and permitted the introduction of evidence that was not reciprocally admissible.

Whatever may be the determination of the initial propriety of joinder under Rule 8(a), it was clearly prejudicial under Fed. R. Crim. P. 14 and the tax counts should have been severed.

Petitioner's motion was timely made since it was made before trial in compliance with Fed. R. Crim. P. 12(b)(5), *United States* v. *Brooks*, 567 F.2d 134 (D.C. Cir. 1977) and *United States* v. *Swainson*, 548 F.2d 657 (6th Cir. 1977). The motion was reiterated during trial, *United States* v. *Kaplan*, 554 F.2d 958 (9th Cir. 1977) and raised after trial at the motion for a new trial under Rule 33, *United States* v. *Wilson* 434 F.2d 494, 512 (D.C. Cir. 1970).

The court's failure to grant the severance of the tax counts in petitioner's case wreaked great prejudice on him in the three categories explained by C.A. Wright and cited in *United States* v. *Ragghianti*, 527 F.2d 586 (9th Cir. 1975) which found reversible error in denial of the motion to sever:

> Professor Wright notes three possible kinds of prejudice which can grow out of joinder of similar offenses not arising out of the same transaction: 1) the jury may consider that the defendant must be bad to have been charged with so many things; 2) inadmissible proof of one offense may be admissible through a joined offense; and 3) the defendant may wish to testify on one count but not another.

> Wright, Federal Practice and Procedure, Criminal § 222 (1969), 527 F.2d at 587.

The Third Circuit opinion here suggests that Marlin's familiarity with the secret accounts supports his testimony that petitioners had discussed with him a plan to use the account to effectuate future schemes involving the pension fund. The trial court, of course, noted that Marlin had said no such thing. The Third Circuit also suggested that the evidence tended to show a close association between petitioner and Marlin which supports the conspiracy conviction. Of course, there was never any issue as to the relationship between petitioner and Marlin. In dealing with a similar proposition, the court in *United States* v. *Halper*, 590 F.2d 422, 432 (2d Cir. 1978) emphasized that for such evidence to be admissible ... "its relevance to an issue truly in dispute must be demonstrated."

In the instant case, the Court of Appeals upheld the trial court's retroactive ruling on the admissibility of the Swiss bank account evidence based on the Rule 403 probative versus prejudicial balancing test. The Court of Appeals did not note that the only consideration given to that theory of admissibility of this evidence occurred two months after the close of trial. Moreover, the Third Circuit did not consider the court's ruling on the admissibility of the evidence in the light of the continually advanced motion for severance.

Even if the prejudice did not so clearly outweigh the probative nature of the evidence, the teachings of *Hill* v. *United States*, 418 F.2d 449 (D.C. Cir. 1968) point to the correct path:

> Even when evidence of one crime is in or near the zone of admissibility to prove the other, prejudice may result if the handling of the evidence and introduction on argument or in instructions tends to blur the limited evidentiary use. When the issue is doubtful, ultimate wisdom may lie in separation rather than combination.

Aggravating the failure to sever here is the fact that there was no curative instruction limiting the use of the Swiss bank evidence to the specific purpose for which its admission was retroactively justified two months after trial. *United States* v. *McClain*, 520 F.2d 233 (D.C. Cir. 1971).

Because counts 8 and 9 were not part of the same transaction as the previous counts, there was misjoinder under Rule 8(a). Because there was substantial prejudice arising from the admission of evidence concerning the Swiss bank account, a severance should have been granted petitioner and the failure to do so is inconsistent with decisions of this Court and is squarely in conflict with decisions in other Circuits. Accordingly, petitioner suggests that this conflict between the Third Circuit and other Circuits must be resolved by this Court.

IV. PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE COURT'S FAILURE TO HOLD AN EVIDENTIARY HEARING TO DETERMINE THE CIRCUMSTANCES OF THE DESTRUCTION OF RECORDS WHICH HAD BEEN IN THE POSSESSION OF THE GOVERNMENT.

Before trial petitioner moved for the dismissal of the indictment because of the government's failure to provide him with relevant evidence previously in its possession. The denial of his motion for an evidentiary hearing to explore the loss or destruction by the government of that discoverable evidence amounts to a denial of petitioner's right to compulsory process and raises a question of the fundamental fairness of his trial. *See, Government of the Virgin Islands* v. *Testamark*, 570 F.2d 1162 (3d Cir. 1978).

Where the government has been unable to produce potential evidence because it has been lost or destroyed, the court must conduct an evidentiary hearing. *See, Johnson* v. *United States*, 298 A.2d 516 (D.C. Ct. App. 1972). The hearing should include testimony as to (1) who within the government is responsible for the loss or

destruction, *see, United States* v. *Butler*, 499 F.2d 1006 (D.C. Cir. 1974); (2) whether the loss or destruction was deliberate, done for an improper purpose, negligent, or inadvertent, *United States* v. *Gantt*, 617 F.2d 831 (D.C. Cir. 1980); (3) the extent to which the government has promulgated and generally followed procedures designed to preserve evidence, *United States* v. *Augenblick*, 393 U.S. 348 (1969); (4) whether the applicable procedures were followed in the particular case, *see, United States* v. *Bryant*, 439 F.2d 642 (D.C. Cir. 1971); and (5) what steps were taken by the government to locate or reconstruct the missing evidence when its loss was discovered, *Johnson* v. *United States*, 336 A.2d 545 (D.C. Ct. App. 1975). Under *Bryant*, the burden is upon the government to explain and justify the failure to preserve potentially discoverable evidence and the "burden of explanation on the Government must be a heavy one." 439 F.2d at 651. *See also, Government of the Virgin Islands* v. *Testamark, supra*; *United States* v. *Bryant*, 448 F.2d 1182, 1184 (D.C. Cir. 1971) and *United States* v. *Butler*, 499 F.2d 1006 (D.C. Cir. 1974).

In his pretrial motion, petitioner requested the production of personal records of Barry Marlin which had been turned over to the United States Government and records of the First Kensington Bank which had been in the possession of a United States Postal Service Inspector. The Third Circuit concluded that the trial court did not err in denying the motion for an evidentiary hearing because petitioner "failed to make any showing that the evidence sought ever existed or was relevant to the instant proceeding." Slip Opinion at 16.

In fact, the existence of the First Kensington Bank records and their possession by the United States Government had been sworn to by the government's chief trial attorney in this case. The affidavit of the attorney stated that the postal inspector had obtained these records from the liquidator of the First Kensington Bank and had "routinely discarded copies of the documents that had been furnished him" after Marlin was sentenced in California in April 1978. The postal inspector opined,

. owever, "that none of the documents were exculpatory in nature in regard to the charges in the instant indictment."

The relevance of these documents can be seen in the testimony of Max Cohen whose testimony was primarily responsible for the convictions obtained in counts 8 and 9, which were founded on the interest allegedly earned by the funds from the Swiss bank account. Mr. Cohen testified at trial from his bare recollection, but stated that the best evidence of the accrual of the contested interest would have been the First Kensington Bank records—the records that had been destroyed by the postal inspector. As was clearly established by the government's own affidavit and witnesses, the missing documents which had been in the possession of the government were highly germane to the proof of the government's case. Although it is within the realm of possibility that the destruction of these relevant records could have been explained satisfactorily, it is irrefutable that by offering no explanation of the circumstances under which they were allegedly discarded, the government could not have met the burden of explanation imposed on it by *United States* v. *Bryant, supra,* and *United States* v. *Augenblick, supra.*

Accordingly, this Court should unequivocally find that there is no dispute that the destroyed records were relevant and were once in the possession of the government, and that the government must show it has promulgated and attempted in good faith to follow rigorous and systematic procedures designed to preserve all discoverable evidence gathered in the course of the criminal investigation as required in *United States* v. *Bryant, supra.* Since petitioner was denied due process of law by the Third Circuit's failure to require such a hearing, in direct conflict with the District of Columbia Circuit procedure, his Petition for Writ of Certiorari should be granted.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that this Court should issue a writ of certiorari to the Court of Appeals for the Fourth Circuit to review its decision.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2052 and 80-2053

UNITED STATES OF AMERICA

v.

FRIEDLAND, DAVID,
Appellant in No. 80-2052

UNITED STATES OF AMERICA

v.

FRIEDLAND, JACOB
Appellant in No. 80-2053

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D.C. Criminal Nos. 79-00246-01 and 79-00345-02)

Argued July 23, 1981

Before: ADAMS, HUNTER, and SLOVITER, *Circuit Judges*

Opinion filed October 1, 1981

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OPINION OF THE COURT

HUNTER, *Circuit Judge*.

I. The appellants, David and Jacob Friedland, were convicted of soliciting and accepting kickbacks in their capacity as general counsel to the Teamsters' Local 701 Pension Fund in North Brunswick, New Jersey ["the Fund"], in violation of 18 U.S.C. §1954 (1976);[1] obstructing justice by soliciting another to give false testimony before the grand jury investigating the kickbacks, in violation of 18 U.S.C. §1503 (1976);[2] and filing false income tax statements for the years in which they re-

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1. 18 U.S.C. §1954 provides:

Whoever being . . . counsel . . . of any employee welfare benefit plan or employee pension benefit plan receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan . . . shall be fined not more than $10,000 or imprisoned not more than three years, or both. . . .

2. 18 U.S.C. §1503 provides:

Whoever . . . corruptly or by threats of force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

ceived the kickbacks, in violation of 26 U.S.C. §7206(1) (1976).[3]

2. This appeal raises the following issues:

a) Must appellants be shown to have duties with respect to the pension fund in order to come within the scope of 18 U.S.C. §1954? Must appellants have committed any acts in order to be found to have solicited or accepted payment "because of" their actions, decisions, or other duties relating to the Fund?

b) Did the trial court err in refusing to conduct an evidentiary hearing concerning the alleged loss or destruction of discoverable evidence by the Government?

c) Did the trial court err in allowing certain exhibits in the jury room?

Did the trial court err in finding that the Government's opening statements were not prejudicial?

Did the trial court err in permitting the introduction of evidence concerning appellants' secret Swiss bank account?

Did the trial court err in refusing to conduct an inquiry into appellants' allegation that the jury improperly considered appellants' failure to testify?

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3. 26 U.S.C. §7206(1) provides:

Any person who . . . [w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

d) Must an indictment charging a violation of 18 U.S.C. §1503 for obstruction of justice, which is based upon the solicitation of false statements, specify the false statements allegedly solicited?

e) Did the trial court err in denying appellants' motion for a new trial?

3. We have reached the following conclusions:

a) Implicit in the finding that appellants were counsel to the Fund is a finding of sufficient duties to bring them within the scope of §1954. Appellants need not have committed any acts in order to violate the "because of" provision of §1954; it is sufficient that they accepted payment with the stated purpose of exercising their influence over the Fund.

b) Appellants failed to show the existence or relevance of the documents in question; thus, an evidentiary hearing was not warranted.

c) The trial court did not err in finding that the presence of challenged exhibits in the jury room, and the Government's opening statements, did not prejudice appellants.

It was not arbitrary or irrational for the trial court to find that the probative value of the Swiss bank evidence outweighed the danger of prejudice therefrom.

The trial court did not err in finding that the inquiry requested by appellants into jury deliberations was prohibited by Fed. R. Evid. 606(b).

d) An indictment for obstruction of justice need not meet the same specificity requirements as an indictment for making false statements, even though the obstruction of justice count is based upon solicitation of false statements.

e) The trial court carefully considered all the evidence on the record before denying the motion for a new trial. We cannot say that the court abused its discretion in doing so.

4. Therefore, we affirm the judgment of the trial court in all respects.

FACTS

5. David Friedland and his father, Jacob, are attorneys who served for many years, up to and including 1976, as general counsel to the pension fund maintained by Teamsters' Local 701 of North Brunswick, New Jersey. Trial Transcript at 63. That fund was an employee benefit plan within the meaning of 18 U.S.C. §1951. In their role as counsel, the Friedlands were obligated to consult with the trustees of the Fund when requested, and were required to attend and provide advice at all trustees' meetings. Although the trustees employed an investment manager to oversee investment of the Fund's assets, the trustees retained significant authority over investments. The trustees had the responsibility for selecting the manager and for deciding, when the management contract expired, whether to continue the manager's services or to seek a replacement. The trustees also had complete discretion to direct particular investments at any time.

6. Until 1974, the Fund's investments had been managed by Lionel D. Edie & Co. Because of their dissatisfaction with the return on the Fund's investments, the trustees decided in late 1973 to seek a new investment manager. David Sack, the administrator of the Fund, was responsible for presenting potential managers to the trustees. Sack invited a few companies to two trustees' meetings, where they presented their proposals for investment of the Fund's assets. At the second of these meetings, David Friedland introduced A. Stone

Douglass, who represented Unicorn Pension Management Associates, a relatively inexperienced investment firm. Friedland stated that Douglass was an "excellent" investment counselor who had received a "fantastic" rate of return on investments he had made. Trial Transcript at 1247. David Sack had never met Douglass, nor had he invited Unicorn to make a presentation to the trustees at any meeting.

7. Soon after this meeting was held, Sack was informed that Unicorn had been selected by the trustees as the new investment manager. After Unicorn had served for some time as investment manager, A. Stone Douglass left Unicorn and formed his own firm, Douglass Embry Co. Shortly thereafter, the trustees transferred management of the Fund's investments from Unicorn to Douglass Embry Co.

8. In February 1975, the Friedlands were introduced to Barry Marlin, a California businessman, at a party given by Kate Edelman, a mutual friend. At that time, Marlin was seeking financing for one of his business ventures, Dunhill Brown Corp. To obtain financing, Marlin had arranged for a public offering of $3.5 million in Dunhill Brown debentures. When Marlin mentioned the upcoming public offering to David Friedland, Friedland replied, "I have a client that could do a loan like that if you are interested." Trial Transcript at 174.

9. Marlin initially declined Friedland's offer, but later arranged to meet with him in Kate Edelman's New York apartment in February or March of 1975 to discuss the loan. Marlin requested a $3.5 million loan for a term of four or five years at ten percent interest; Friedland would agree only to a term of one or two years at twelve percent interest. David Friedland then disclosed that the source of the loan was a pension fund for which he served as general counsel, and he stated that he would require a ten percent kickback. Marlin agreed to pay a

nine percent kickback ($315,000). Friedland insisted that Marlin pay the kickback in cash, in $100 bills, and that the money be withdrawn from sources outside the United States banking system. Marlin stated that he would use a bank under his control, the First Kensington Bank of the Cayman Islands.

10. Shortly thereafter, Marlin met with both David and his father, Jacob Friedland. After reviewing the terms of the loan, Jacob Friedland informed Marlin that the loan could be renewed every two years in exchange for an additional nine percent kickback. Jacob Friedland emphasized that the funds used to pay the kickback could not be taken from the loan proceeds, but would have to be drawn from sources outside the United States banking system.

11. After the meeting with representatives of Unicorn, Marlin expressed concern to David Friedland that Unicorn might not approve the loan to Dunhill Brown Corp. Friedland reassured Marlin, stating that "[i]f they don't give you the loan we'll take the fund away from them." Trial Transcript at 196.

12. In April 1975, David Friedland informed Marlin that the loan had been approved on the terms to which they had previously agreed. Friedland also told Marlin that the kickback would have to be paid on the same date as the closing, April 25, at a location outside the United States. Friedland suggested his condominium in Freeport, Bahamas, as a suitable site for payment of the kickback.

13. Marlin arranged to have his brother, Herbert, attend the closing of the loan in New York, on April 25, 1975. On the morning of April 25, Barry Marlin met David Friedland at Friedland's condominium in Freeport, Bahamas. After confirming that the loan proceeds had been paid, Marlin emptied his BOAC flight bag, containing the $315,000 kickback in one hundred dollar bills, onto the living room floor, where Friedland counted it.

14. In early May 1975, Marlin asked David Friedland whether the Fund could lend him an additional amount not greater than $1,000,000 so that he could open a business in New York; he added that the funds would not be needed until the end of the year. Friedland said that such a loan could be extended on the same terms as the first, provided that Marlin paid a nine percent kickback. Marlin did not actually request that the loan be made at this time.

15. In June 1975, David Friedland informed Marlin that in the future, instead of receiving a percentage of all loans arranged, he and his father wanted fifty percent of the profits of any business to which a loan was granted. David Friedland then gave Marlin what Friedland termed "information" Marlin "might need for the future." Trial Transcript at 263. Friedland revealed that he and his father had an account in the Banque de L'Indochine et de Suez, in Lausanne, Switzerland, under the code name Stephen Sagleo.[1] Friedland also gave Marlin the name, address, and phone number of the Friedlands' Swiss banker, Alain Peytral.

16. In the following months, Marlin attempted to obtain loans from the Fund for several business ventures. None of these loans was finalized. During this same period, Marlin was also seeking depositors for his First Kensington Bank, in order to improve its balance sheet.

17. On July 16, 1975, David and Jacob Friedland, who had complained of the low rate of interest paid by their Swiss bank, transferred $1,050,000 of their personal funds to the First Kensington Bank's accounts at two London banks. The First Kensington Bank used these funds to purchase certificates of deposit paying 8.5 percent interest, and then endorsed the certificates back to the Friedlands' Swiss bank, the Banque de

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1 The name "Sagleo," according to testimony, was arrived at by combining David Friedland's astrological sign, "Sagittarius," with his wife's sign, "Leo." Trial Transcript at 261.

L'Indochine et de Suez. This transaction apparently allowed the First Kensington Bank to carry the certificates on its balance sheet, and allowed the Friedlands to earn higher interest on their funds while retaining the security afforded by a Swiss bank. The Friedlands' personal funds remained on deposit at the London banks until March 19, 1976, and earned in excess of $60,000 in interest.

18. David Friedland's federal income tax return for 1975 listed adjusted gross income of $26,692 and interest income of $21. His 1976 form listed adjusted gross income of $28,134 and interest income of $0. Jacob Friedland's 1975 federal income tax return listed adjusted gross income of $42,124 and interest income of $13. His return for 1976 listed adjusted gross income of $30,623 and interest income of $14.

19. In October 1975, Marlin requested a loan for his new business in New York, according to the terms he had discussed with David Friedland in May 1975. Marlin said that he would need $500,000. The Friedlands agreed that the loan would be granted in December, in exchange for a kickback of nine percent, or $45,000. In December, Marlin gave David Friedland the $45,000 in cash on the same day the loan was scheduled to close.

20. In January 1976, Marlin's financial empire began to collapse, and he discovered that he was under investigation by the Securities Exchange Commission. At about this time, David Friedland told Kate Edelman about the kickbacks that had been received from Marlin, and expressed fear that Marlin might report the kickbacks to the authorities.

21. In May 1977, Marlin was indicted in California for fraudulent business practices. In July 1977, he was indicted on similar charges in Illinois. He pleaded guilty in both jurisdictions, and was sentenced to five years imprisonment in Illinois, and to a concurrent ten year term in California. In early May 1979, Marlin began cooperat-

ing with the government and revealing the details of his kickbacks to the Friedlands.

22. On July 4, 1979, the Friedlands met with Kate Edelman and told her that Marlin had "talked." They outlined exactly what they wanted her to tell the authorities when she was contacted. In reference to the first loan and kickback, they asked her to say that she had seen a suitcase with $750,000 cash in it, part of which Marlin was planning to take to his bank in the Cayman Islands, and part of which Marlin intended to use to buy a condominium in the Bahamas. The Friedlands offered to pay any legal expenses Edelman incurred, and discussed the possibility of obtaining transcripts of any grand jury hearings to enable Edelman to "take the onus" off Marlin resulting from any incriminating testimony given by others. Edelman was contacted by the FBI later the same day, and was served with a grand jury subpoena on the following day.

PROCEDURAL HISTORY

23. In October 1979, the Grand Jury for the District of New Jersey returned a multicount indictment charging appellants David Friedland and Jacob Friedland with one count of conspiracy to solicit and receive kickbacks, 18 U.S.C. §371 (1976); two counts of soliciting and receiving kickbacks, 18 U.S.C. §1954 (1976); one count of traveling and causing to travel with intent to promote and facilitate bribery, 18 U.S.C. §1952 (1976); and one count of endeavoring to obstruct justice, 18 U.S.C. §1503 (1976). In January 1980, the grand jury returned a superseding indictment which, in addition to the charges listed above, charged each appellant with two counts of making false income tax returns, 26 U.S.C. §7206(1) (1976).

24. Before trial, the appellants moved to dismiss Counts 2, 3, 4 and 5 of the indictment, on the ground

that, by failing to allege any duty, decision, or action on their part as the basis for the payment of the kickback, Counts 2, 3 and 4 failed to charge an essential element of the crimes. The appellants also argued that the charges in these counts, particularly the obstruction of justice charge in Count 5, were not specific enough to be met, or to prevent double jeopardy in future prosecutions. The appellants also moved pursuant to Fed. R. Crim. P. 14 to sever the income tax fraud counts from the remainder of the indictment, in order to prevent prejudice from joinder. The trial court denied these motions.

25. Following trial, the jury returned a verdict of guilty against both Jacob and David Friedland on all counts. The appellants filed a motion for a judgment of acquittal on all counts, pursuant to Fed. R. Crim. P. 29(c), and in the alternative, for a new trial pursuant to Fed. R. Crim. P. 33. The trial court denied appellants' motions.

DISCUSSIONS

Scope of 18 U.S.C. §1954

26. Appellants were convicted under 18 U.S.C. §1954, which provides in pertinent part:

> Whoever being . . . counsel . . . of any employee welfare benefit plan or employee pension benefit plan receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan . . . shall be fined not more than $10,000 or imprisoned not more than three years, or both. . . .

The trial court, in his instructions to the jury, recognized that there are two prongs to §1954: one may be convict-

ed for receiving a kickback (a) "because of" or (b) "with intent to be influenced with respect to" any actions, decisions, or other duties relating to the plan involved.

27. Appellants contend that the trial court erred in failing to instruct the jury that it must find that appellants had some capacity to influence the granting of the loan. Appellants cite this court's decision in *United States v. Palmeri*, 630 F.2d 192 (3d Cir. 1980), *cert. denied*, —— U.S. ——, 101 S. Ct. 1484 (1981), in support of this proposition. They contend that *Palmeri* requires a finding that appellants had a demonstrated capacity to control or influence the issuance of loans. In so doing, appellants read too much into the *Palmeri* decision. In *Palmeri*, this court held that one could be among the class of persons whose actions are proscribed by §1954 even though one has no fiduciary relationship to the employee benefit plan. 630 F.2d at 199-200. The central issue in that case was whether one must have a capacity *directly* to influence the employee plan in order to violate §1954. *Palmeri* clearly stands for the proposition that capacity to influence *indirectly* is sufficient to support conviction under §1954.[5] The jury in the instant case found that appellants were counsel to the Fund.[6] Appellants' status as counsel to the Fund is sufficient to place them in the class of those persons capable of violating either prong of §1954 simply by soliciting or accepting payment (a) by virtue of their status as counsel, under the "because of" prong, or (b) with an improper purpose, under the "intent" prong. Therefore, the failure

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5. The *Palmeri* court stated: "The more reasonable construction of [§1954] is one that includes within the regulated class all persons who exercise control, direct or indirect, authorized or unauthorized, over the fund." 630 F.2d at 199.

6. The trial court instructed the jury that it must find that appellants were counsel to the Fund in order to render a guilty verdict under Count 3 of the indictment. Appendix at 351. Appellants were found guilty under Count 3.

to instruct the jury to make a specific finding of "capacity" was not error.

28. Appellants further contend that the trial court erred in its instructions regarding the "because of" prong, and, because the jury's guilty verdict may have rested on either prong, the verdict must be overturned. *See United States v. Dansker*, 537 F.2d 40, 51 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). Appellants claim that the trial court erred in charging the jury:

> Furthermore, you need not find the defendants actually influenced the granting of the loans to find they received the cash payments because of his [*sic*] actions, decisions, and duties relating to the loans, so long as such influence was the stated purpose in receiving the cash payments.

Appendix at 353. Appellants argue that, in order to come under the "because of" prong, they must be shown to have actually taken some action in return for the kickback.

29. This court confronted a similar argument in *United States v. Niederberger*, 580 F.2d 63 (3d Cir.), *cert. denied*, 439 U.S. 980 (1978). Niederberger was charged with receiving an illegal gratuity in violation of 18 U.S.C. §201(g), which provides:

> Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or *because of* any official act performed or to be performed by him . . . shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

(Emphasis supplied.) We rejected Niederberger's claim that the indictment must allege some quid pro quo for the gift received. Noting that §201(c)(1) substitutes the phrase "in return for" for "because of," we stated:

> It is clear, then, that §201(c)(1) requires as one of its elements a quid pro quo. In fact, we find this to be the primary distinction between subsections (c)(1) and (g). . . .
>
> Thus, we find it unnecessary for the Government to allege in an indictment charging a §201(g) offense that a gratuity received by a public official was, in any way, generated by some specific, identifiable act performed or to be performed by the official. A quid pro quo is simply foreign to the elements of a subsection (g) offense. What is proscribed, simply put, is a public official's receipt of a gratuity, to which he was not legally entitled, given to him in the course of his everyday duties, for or because of any official act performed or to be performed by such public official, and he was in a position to use his authority in a manner which could affect the gift-giver.

580 F.2d at 68-69.

30. We find this analysis equally applicable when it is counsel to a pension fund, and not public officials, who receive what the *Niederberger* court called an "illegal gratuity." *Id.* We believe the trial court was correct in not requiring that any action actually be taken in order for the jury to find that the kickback was received "because of" actions, decisions, or other duties relating to the Fund. So long as appellants were counsel to the Fund, and received the kickback (a) because of that status, which gave them at least ostensible power to exercise influence, or (b) with the purpose of exercising the influence they either actually or ostensibly had over de-

cisions regarding the Fund, then they need not be shown to have actually exercised such influence. If actual exercise of influence were a prerequisite to a violation, then anyone who could potentially influence a future decision concerning a pension plan would be free to solicit kickbacks so long as he ultimately took no action to influence the decision. Such a construction is inconsistent with the broad purpose of §1954. *See United States v. Palmeri*, 630 F.2d 192, 199-200 (3d. Cir. 1980), *cert. denied*, —— U.S.——, 101 S. Ct. 1484 (1981).

31. When counsel to an employee pension fund take a kickback for the stated purpose of exercising their influence over the fund, then their actions come within the "because of" prong of §1954.

Denial of the Evidentiary Hearing

32. Appellants contend that the trial court erred in denying their motion for an evidentiary hearing to determine whether the government lost or destroyed certain discoverable evidence. The evidence in question falls into two categories: (1) Barry Marlin's personal financial records; and (2) the records of the First Kensington Bank of the Cayman Islands.

33. This court has held that "[l]oss or destruction of relevant evidence by the government not only raises general questions of the fundamental fairness of a criminal trial, but may also deny a defendant the right to compulsory process." *Virgin Islands v. Testamark*, 570 F.2d 1162, 1166 (3d Cir. 1978). The court below, however, found that the appellants' motion for an evidentiary hearing was unsupported by any showing that the records in question ever existed, or, if they did, that they were relevant to the instant case. The only support for the appellants' motion with respect to Marlin's personal records is the bare inference that appellants would draw from the presence of empty, labeled file folders, coupled

with Marlin's alleged "mania" for record-keeping. Appellants presented no evidence tending to show that the file folders were not empty when the government gained possession of them. Furthermore, the trial court, in its opinion in support of its denial of the motion, noted that the allegations of loss or destruction of this evidence "are little more than suppositions and speculation based entirely on hearsay statements by unidentified third parties and individuals having no personal knowledge of the alleged destruction of evidence. Significantly, no affidavits have been filed by any of these individuals to support defendants' allegations." Appendix at 105-06 (citations omitted) (footnote omitted).

34. Because appellants failed to make any showing that the evidence sought ever existed or was relevant to the instant proceeding, the trial court did not err in denying the motion for an evidentiary hearing.

Presence of Improper or Prejudicial Evidence or Statements Before the Jury; the Jury's Consideration of Appellants' Failure to Testify

35. Appellants seek review of several rulings of the trial court regarding the consideration of certain evidence or statements by the jury. Their first contention is based on a published newspaper interview with a juror. The interview, which took place after the verdict was announced, indicated that the jury had improperly considered and discussed the appellants' failure to testify.

36. The trial court refused to conduct an examination of the jurors to verify the appellants' claim. As the court found, any inquiry into the jury's deliberations would necessarily have violated Fed. R. Evid. 606(b), which provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's

> deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about what he would be precluded from testifying be received for these purposes.

The inquiry requested by appellants falls squarely within the prohibition of Rule 606(b). Because "extraneous prejudicial information" or "outside influence" were not alleged by appellants, the inquiry would not have fallen within the exceptions to the rule. *See United States v. D'Angelo*, 598 F.2d 1002, 1004-05 (5th Cir. 1979). Therefore, the trial court's refusal to conduct the inquiry will be upheld.[7]

37. Appellants further argue that their convictions must be reversed because documents not admitted into evidence were sent to the jury room. The record reveals that the exhibits in question — G77A and C — had been formally and properly admitted without objection.[8]

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7. United States v. Vento, 533 F.2d 838 (3d Cir. 1976), cited by appellants, is inapposite. An inquiry was conducted in that case for the limited purpose of discovering whether, in fact, extraneous prejudicial information was improperly brought to the jury's attention. 533 F.2d at 869-70.

8. In fact, when the Government sought to continue questioning the custodian of these records, counsel for appellant Jacob Friedland stated: "Your Honor, we object. They're now in evidence. The jury can have them. They speak for themselves." Trial Transcript at 1865-66. The record also shows that the clerk announced the receipt of the exhibits in evidence. *Id.* at 1865.

These exhibits included certain financial records of the appellants.

38. Subsequent to admission of these exhibits, the trial court made a ruling excluding certain categories of evidence; the exhibits in question apparently fell into one of the excluded categories. However, no mention was made of exhibits G77A and C at the time of this ruling, and neither the Government nor the defense moved to withdraw them from the jury's consideration. Furthermore, although counsel were afforded ample opportunity to examine all evidence before it was finally submitted to the jury, no objections were made to the submission of these exhibits.[9]

39. Under Fed. R. Crim. P. 51, a party is ordinarily barred from asserting error unless the party "makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor. . . ." If the exhibits were not intended by the court or the parties to remain in evidence, or were not actually admitted into evidence, appellants cannot now object to their presence in the jury room unless they can show that the court committed "plain error." Fed. R. Crim. P. 52(b).

40. When exhibits not in evidence reach the jury, a new trial should not be ordered unless it is shown that the evidence was so prejudicial that the defendant was denied a fair trial. *United States v. Camporeale*, 515 F.2d 184, 188 (2d Cir. 1975); *see also United States v. Stoehr*, 196 F.2d 276, 283 (3d Cir.), *cert. denied*, 344 U.S. 826 (1952). The expenditures revealed in exhibits G77A and C were inconsequential when compared with those re-

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9. In the instant case, the defense counsel were given the opportunity to examine the exhibits before the exhibits were sent to the jury room. In general, the defendant should not be allowed to speculate by letting error go unremarked while then seeking a new trial on the basis of an unfavorable verdict. 3 Wright, *Federal Practice and Procedure* (Criminal) §842, at 342 (1969).

vealed in the remainder of the evidence. We cannot say that the trial court committed "plain error" in finding that the presence of exhibits G77A and C in the jury room did not prejudice the appellants.

41. Appellants also contend that evidence showing that they had a secret Swiss bank account should not have been admitted. Appellants concede that this evidence was relevant to the tax fraud counts in the indictment; however, they argued at trial for severance of these counts because of the prejudicial effect this evidence might have with respect to the remainder of the counts.

42. The trial court denied appellants' motion for severance of the tax fraud counts. It did so because it accepted the Government's argument that the Swiss bank account evidence was relevant to the conspiracy count, Count 1. The Government contended that the appellants had discussed the bank account with Barry Marlin as part of a plan for the distribution of proceeds during future loans to be made from the pension fund. The Government further contended that the revelation of the secret account tended to show a close relationship between appellants and Marlin which supported the conspiracy charge.

43. Under Fed. R. Evid. 401, evidence concerning the appellants' disclosure of the existence of their secret Swiss bank account to Marlin was relevant to prove the conspiracy charged in Count 1. Rule 401 provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Marlin's familiarity with the secret account supports his testimony that appellants had discussed with him their plan to use the account to effectuate future schemes in-

volving pension plan funds. It also tends to show, as the Government contended it would, a close association between appellants and Marlin which supports the conspiracy conviction.

44. Because the evidence concerning the Swiss account was relevant, the only remaining question is whether the evidence should have been excluded under Fed. R. Evid. 403, on the ground that "its probative value [was] substantially outweighed by the danger of unfair prejudice. . . ." The trial court's ruling that exclusion was not warranted should be affirmed unless it was arbitrary or irrational. *United States v. Long*, 574 F.2d 761, 767 (3d Cir.), *cert. denied*, 439 U.S. 985 (1978). The record shows that the trial court carefully considered whether the evidence was sufficiently prejudicial to justify its exclusion, and that the court concluded that it was not. The court's finding was certainly not arbitrary or irrational, and therefore it must be upheld.

45. Finally, appellants contend that certain remarks made by the Government in its opening were so prejudicial as to require reversal. The Government made reference to appellants' "fleecing" of the pension fund, to appellants' "extravagant lifestyle," and to appellants' duty to protect the fund.

46. Even if these remarks are construed as inaccurate or improper, reversal is appropriate only when defendants are prejudiced by the alleged improprieties. *United States v. Somers*, 496 F.2d 723, 737 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974). The trial judge is in the best position to weigh the significance of challenged statements in the context of the entire case, to assess the impact of the statements upon the jury, and to determine what remedy, if any, is appropriate. The trial court should be given broad discretion to control the opening remarks. *Cf. Herring v. New York*, 422 U.S. 853, 862 (1975) (trial court given broad discretion to control closing remarks); *Draper v. Airco, Inc.*, 580 F.2d 91, 94 (3d

Cir. 1978) (same). The trial court carefully supervised all phases of the trial, including the opening; we cannot say that he abused his discretion in finding these remarks unprejudicial.

Count 5: The Obstruction of Justice Charge

47. Count 5 of the indictment charged appellants with violating 18 U.S.C. §1503, which provides in relevant part:

> Whoever . . . corruptly or by threats of force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Count 5 charged that appellants

> did corruptly endeavor to influence, obstruct and impede the due administration of justice in that the defendants endeavored to cause Kate Edelman to render false and misleading testimony before a duly empanelled United States Grand Jury. . . .

Appendix at 34. Appellants urge reversal of their conviction under Count 5 on two grounds: (1) the indictment does not meet this circuit's specificity requirements in false statements cases, and (2) Kate Edelman was not a "witness" within the meaning of §1503.

48. In support of their first contention, appellants cite this court's decisions in *United States v. Slawik*, 548 F.2d 75 (3d Cir. 1977), and *United States v. Tonelli*, 577 F.2d 194 (3d Cir. 1978). Each of these cases involved a challenge to an indictment under 18 U.S.C. §1623, which provides in part:

> Whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United

> States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Because materiality and falsity are expressly included as elements of an offense under §1623, this court imposed a requirement of specificity in the indictment:

> We find the same prosecutorial deficiency which undermined the *Slawik* conviction — the failure to specifically allege in the indictment the precise falsehoods charged — exists here.

Tonelli, 577 F.2d at 196.

49. Appellants contend that the same specificity requirement should be imposed on an indictment under 18 U.S.C. §1503. We cannot agree. Although the method employed by appellants in violating §1503 consisted of an attempt "to cause Kate Edelman to render false and misleading testimony," this case is not thereby transformed into a "false statements case," as appellants contend. Rather, it is an obstruction of justice case. Materiality and falsity are *not* elements of the crime charged here.

50. We conclude that an indictment under §1503 for endeavoring to obstruct justice, which is based upon an attempt to induce the rendering of false testimony, need not satisfy the specificity requirements imposed by *Slawik* and *Tonelli* for a §1623 violation.[10]

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10. Appellants also make what is essentially a variance claim. They note that, in response to an order of the trial court, the Government supplied the following as the false statements which appellants encouraged Kate Edelman to make:

> She saw a suitcase with $750,000 in it which Barry Marlin was taking to his bank in the Cayman Islands; whatever was left of the money after Marlin made a deposit, he was taking to the Bahamas to buy an apartment close to David Friedland's apartment.

Appendix at 192. At trial, the court found the evidence insufficient to sustain a §1503 conviction except as to the allegation that appel-

51. Appellants' second contention is that Kate Edelman was not a "witness" within the meaning of §1503. While this may be true, it is entirely irrelevant. Appellants were charged and convicted under a portion of §1503 which, unlike the other provisions of §1503, does not include any reference to a "witness." Rejecting a claim identical to that advanced by appellants, the court in *Falk v. United States*, 370 F.2d 472 (9th Cir. 1966), *cert. denied*, 387 U.S. 926 (1967), stated:

> [T]he defendant . . . was not charged with influencing a 'witness' within the first provision of Section 1503. [He] was charged with endeavoring to influence, obstruct or impede the due administration of justice. The means of so doing was by attempting to corruptly influence prospective witnesses. It is clear that in the mind of the defendant, they were prospective witnesses. If he had thought otherwise, there would have been no reason to ask [them] to testify falsely. So, while the term 'witness' may be a

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lants solicited the statement regarding Marlin's stated intent to buy an apartment close to David Friedland's. Thus, appellants argue, they may have been *convicted* for soliciting the statement regarding the apartment, while having been *indicted* by the grand jury for soliciting the other statements supplied by the Government.

We need not determine whether this constitutes variance to conclude that it is not, in any event, fatal variance:

> The federal courts have scrapped the old rule condemning every variance between indictment and proof, and convictions are not now set aside except for variance resulting in substantial prejudice to defendant.

Jackson v. United States, 359 F.2d 260, 263 (D.C. Cir.), *cert. denied*, 385 U.S. 877 (1966). In the instant case we can discern *no* prejudice to appellants resulting from the events they allege as variance. As explained in the text, the indictment was sufficient on its face to charge a violation of §1503. The Government, by subsequently supplying the false statements upon which the indictment was based, placed appellants on notice as to what charges they would have to defend themselves against. *See* United States v. Izzi, 613 F.2d 1205, 1210-11 (1st Cir.), *cert. denied*, 446 U.S. 930 (1980).

> word of art in an indictment under the first portion of Section 1503, the phrase 'prospective witnesses' is descriptive only of the intended status of [those whom the defendant attempted to influence] when the Indictment charges obstruction of justice.

370 F.2d at 476. We agree with the *Falk* court in concluding that solicitation of false testimony from a prospective witness may provide the basis for a conviction under the obstruction of justice provision of §1503. In the instant case, Kate Edelman was unquestionably a prospective witness in the minds of defendants when they asked her to testify falsely.[11] As a result, their conduct fell squarely within that portion of 18 U.S.C. §1503 under which they were charged.[12]

The Motion For A New Trial

52. After the jury verdict, appellants moved for a new trial under Fed. R. Crim. P. 33, which provides in relevant part:

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice.

Appellants contend that the verdict against them is unjust because it rests upon the testimony of Barry Marlin. Because appellants believe Marlin's testimony was not credible, they contend that the trial court should have granted a new trial "in the interest of justice."

53. The denial of the motion for a new trial will be upheld so long as the trial court did not abuse its discretion or fail to exercise it. *United States v. Iannelli*, 528

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11. When appellants suggested that Edelman make the statements involved, she stated that she had not been contacted by the authorities. Appellants responded: "But you will." Trial Transcript at 1929.

12. Because we find that Edelman was a prospective witness under *Falk*, we need not confront the question whether appellants could have been convicted under the obstruction of justice provision were Edelman *not* a prospective witness.

F.2d 1290, 1292 (3d Cir. 1976). The record reveals that the trial court carefully considered the evidence in the case before reaching its conclusion. The trial court expressly recognized its power to consider the credibility of Government witnesses, specifically Marlin. Appendix at 572-75. Nevertheless, the court found Marlin sufficiently competent to allow the jury to decide whether or not he should be believed.[13] We cannot say that it was an abuse of discretion to defer to the jury in this case, in which ample evidence on the issue of Marlin's credibility was placed before the jury.[14]

54. Moreover, the record reveals that the trial court did not end its inquiry after accepting the jury's determination of Marlin's credibility. The court found significant corroborating evidence on the record.[15] In sum, the court carefully satisfied itself that, given the evidence in the record, including the credibility of witnesses, an injustice had not been committed as a result of the jury's

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13. In denying the motion for a new trial, the trial court stated: "Criminal cases, and this one is no exception, usually are fought on the battlefield of credibility. . . . A witness such as Marlin is not incompetent to be a witness." Appendix at 574.

14. Responding to a credibility challenge similar to that of appellants, the Supreme Court, in Glasser v. United States, 315 U.S. 60 (1942), stated: "The short answer to this is that the credibility of a witness is a question for the jury." *Id.* at 77.

15. In support of its denial of appellants' motion for a new trial, the trial court stated:

> . . . I must part company with the defendants when they claim that Marlin is not corroborated. . . . He was corroborated principally by the testimony of Kate Edelman, Fred Otash and Max Cohen. There is also significant corroboration contained in the great mass of documentary evidence introduced.
>
> * * *
>
> In short, although I recognize that there can be most legitimate question concerning Marlin's credibility, those questions were fully explored and presented issues for the jury. I cannot say on the record of this case that a miscarriage of justice occurred and I do not believe that judicial interference with the verdicts is warranted.

Appendix at 575-76.

verdict. We conclude that the trial court did not abuse its discretion in denying the motion for a new trial.

Barry Marlin's Credibility

55. Appellants grounded their attack in this appeal upon Marlin's lack of credibility. Appellants' briefs commence with an "Introductory Statement," quoting at length the trial court's characterization of Marlin as, among other things, a "gargantuan thief."[16] The briefs are replete with quotations in which the trial court expressed its opinion that Marlin was an unsavory character who was not believable. Apparently, the appellants would have us overturn the verdict based upon our reading of the trial court's assessment of Marlin's credibility, despite the trial court's finding that Marlin was a competent witness.[17] This we cannot do.

56. The issue of Marlin's credibility was amply tested at trial. Both judge and jury heard and saw Barry Marlin testify at great length. Marlin was subjected to vigorous cross-examination by experienced counsel. Marlin's testimony on cross-examination alone occupies over 700 pages in the record. Nevertheless, although the jury could have refused to believe Marlin's testimony, it obviously decided not to do so. And, although the trial court could have granted appellants' motion for a new trial, after a consideration of the credibility issue it decided not to do so. In this appeal, the main thrust of appellants' argument is directed against Marlin's testimony. Appellants would have us make a credibility judgment different from that made by the trial court and jury. We decline.

57. The judgment of the district court will be affirmed.

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16. Brief for Jacob Friedland at 4; incorporated by reference in Brief for David Friedland at 2.

17. *See* note 13 *supra*.

ADAMS, *Circuit Judge*, concurring.

This case presents several troubling aspects. Much of the evidence in support of the convictions here consists of testimony by Barry Marlin, a witness who the district court indicated was unworthy of belief. Prejudicial testimony regarding the existence of a Swiss bank account in the name of the Friedlands was heard by the jury despite the government's ultimate failure to connect the Swiss bank account to the transactions in question, although such connection was promised by the prosecution at the time the evidence was introduced. Either of these matters might properly have been a basis for a district court decision to grant defendants' motion for a new trial. Furthermore, there appears to be a serious question whether a hearing should have been conducted to determine if some of the documentary evidence had been tampered with in an impermissible manner. Nevertheless, the record is insufficient to support the contention that the district court's refusal to hold a hearing on the possible destruction of evidence or to grant a motion for a new trial was either an abuse of discretion or legal error. Accordingly, I concur in the result reached by the majority.

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Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Opposition

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Nos. 81-1486 and 81-1490

In the Supreme Court of the United States

OCTOBER TERM, 1981

DAVID J. FRIEDLAND, PETITIONER

v.

UNITED STATES OF AMERICA

JACOB FRIEDLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the jury was correctly instructed concerning one of the elements of 18 U.S.C. 1954.

2. Whether the evidence supported petitioners' convictions for that offense.

3. Whether there was a constructive amendment of the indictment.

4. Whether an evidentiary hearing was required concerning the alleged loss or destruction by the government of discoverable evidence in its possession.

5. Whether counts of the indictment charging income tax offenses were properly joined with the other charges and whether a severance was properly denied.

6. Whether certain exhibits sent to the jury room were admitted into evidence and, if they were not, whether petitioners' convictions must be reversed as a result.

7. Whether the count of the indictment charging petitioners with endeavoring to obstruct justice, in violation of 18 U.S.C. 1503, was fatally defective.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-27a)[1] is reported at 660 F. 2d 919.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28a-29a) was entered on October 1, 1981, and petitions for rehearing were denied (Pet. App. 30a-31a) on November 10, 1981.

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[1]Unless otherwise noted, hereinafter "Pet. App." refers to the appendix to the petition in No. 81-1490.

The petitions were filed, after an extension, on February 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners were tried and convicted in the United States District Court for the District of New Jersey of conspiracy to solicit and receive kickbacks in their capacity as counsel to a union pension fund, in violation of 18 U.S.C. 371; soliciting and receiving such kickbacks, in violation of 18 U.S.C. 1954; interstate travel with the intent to promote and facilitate bribery, in violation of 18 U.S.C. 1952; endeavoring to obstruct justice, in violation of 18 U.S.C. 1503; and making false income tax returns, in violation of 26 U.S.C. 7206(1).[2] The court of appeals unanimously affirmed their convictions (Pet. App. 1a-27a).

2. In brief summary, the evidence at trial showed the following. Petitioners served for many years as general counsel to a Teamsters local pension fund in New Jersey (Pet. App. 5a). In 1973, the trustees of the fund decided to retain a new investment manager, and an inexperienced firm called Unicorn Pension Management Associates was eventually selected (*id.* at 5a-6a). Although Unicorn was not among the firms invited by the fund administrator to make presentations at trustees' meetings, A. Stone Douglass, a Unicorn partner, attended one of the meetings and was introduced to the administrator by petitioner David Friedland, who praised Douglass highly (*ibid.*). When Douglass subsequently left Unicorn for another firm, management of the fund's assets was transferred to that firm (*id.* at 6a).

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[2]Petitioner David Friedland was sentenced to a total of seven years' imprisonment and a $35,000 fine. Petitioner Jacob Friedland was sentenced to a total of two years' imprisonment and a $35,000 fine and was placed on two years' probation.

Although Unicorn was employed during the period in question to oversee investment of the fund's assets, the trustees retained significant authority over the fund's investments (*id.* at 5a). Among other things, the trustees had the responsibility for selecting the investment manager and for deciding whether to continue his services or to find a replacement (*ibid.*). In addition, the trustees had complete discretion to direct particular investments at any time (*ibid.*). In 1975, when the loans central to this prosecution were made, the fund had only two trustees: a representative of management and Robert Coar, the president of the local (Tr. 1250).[3] Petitioners boasted that they could secure loans from the fund as long as Coar retained his union post (Tr. 264-265).

In early 1975, petitioners met Barry Marlin, a California businessman engaged in numerous frauds (Pet. App. 6a; Tr. 130-135). Marlin was seeking $3,500,000 in financing for one of his companies, and David Friedland said that he had a client that could make such a loan (Pet. App. 6a). Marlin accepted the offer, and he and David Friedland then negotiated the terms of the loan (Pet. App. 7a; Tr. 180-183). In exchange for the loan, Marlin agreed to pay a 9% kickback (*i.e.*, $315,000) and promised to withdraw the funds from a foreign bank under his control, the First Kensington Bank of the Grand Cayman Islands (Pet. App. 7a).

A short time later, Marlin became apprehensive that Unicorn might not approve the loan, but David Friedland told him, "If they don't give you the loan, we'll take the fund away from them" (Pet. App. 7a). A few weeks later, the loan was approved on the terms previously negotiated (*ibid.*). On April 25, the closing of the loan took place in New York, and Marlin simultaneously delivered $315,000 in cash to

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[3] "Tr." refers to the trial transcript.

David Friedland at the latter's condominium in Freeport, Bahamas (*ibid.*).

In early May 1975, Marlin asked David Friedland whether later that year the pension fund could lend him an additional amount not greater than $1,000,000 so that he could open a new business in New York (*id.* at 8a). David Friedland stated that such a loan could be extended in exchange for a 9% kickback (*ibid.*).

In June 1975, David Friedland informed Marlin that in exchange for arranging future loans petitioners wished to receive 50% of the profits of any business to which such loans were made. David Friedland then gave Marlin "information" that Marlin "might need for the future." He disclosed that he and his father had an account at a Swiss bank under a fictitious name. He also provided the name, address, and telephone number of their Swiss banker (Pet. App. 8a).

In July 1975, petitioners, who had become dissatisfied with the low rate of interest paid by their Swiss bank, transferred $1,050,000 of their personal funds from that bank to the First Kensington Bank's account at two London banks. Those funds were then used to purchase interest-bearing certificates of deposit. Petitioners' funds remained on deposit in London for about nine months and earned more than $60,000 interest (Pet. App. 8a-9a).

In October 1975, Marlin renewed his request for a loan for his New York business and stated that he would need $500,000. Petitioners agreed to obtain the loan in exchange for a kickback of 9% ($45,000). In December, the loan closed, and on the same day Marlin gave David Friedland a cardboard box containing $45,000 in cash (Pet. App. 9a; Tr. 308-309, 1732-1733).

In January 1976, Marlin's business began to collapse, and he discovered that his activities were under investigation.

David Friedland confided to Kate Edelman, Marlin's wife and an old friend, that he had received kickbacks from Marlin. He expressed fear that Marlin might report him to the authorities. In May 1977, Marlin was indicted on federal charges in California and Illinois. He later pleaded guilty and revealed his illegal dealings with petitioners (Pet. App. 9a-10a).

On July 4, 1979, petitioners met with Kate Edelman and requested that she give false testimony to the grand jury investigating petitioners (*id.* at 10a).

Petitioners' income tax returns for 1975 and 1976 reported neither the $360,000 in kickbacks nor the $60,000 interest earned during the short time that their funds remained on deposit in the London banks (Pet. App. 9a).

ARGUMENT

The decision of the court of appeals is correct and conflicts with no decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners contend (81-1486 Pet. 11-12; 81-1490 Pet. 17-21) that the district court erred in instructing the jury concerning one of the elements of the offense proscribed by 18 U.S.C. 1954. Petitioners' argument clearly lacks merit.

18 U.S.C. 1954 makes it illegal for certain persons, including the "counsel" of a union pension fund, to receive, agree to receive, or solicit any fee, kickback, commission, gift, loan, money, or thing of value either "because of" or "with intent to be influenced with respect to, any of the actions, decisions or other duties relating to any question or matter concerning such plan * * *." In this case, petitioners, who were general counsel to the pension fund, were charged with soliciting and receiving kickbacks both "because of" and "with intent to be influenced with respect to" their actions, decisions and duties relating to the fund. Petitioners do not challenge the trial court's instructions

concerning the "with intent to be influenced" prong of the statute. Nor do they contest the sufficiency of the evidence supporting their conviction under that prong. Petitioners maintain, however, that the district court erred in giving the following instruction concerning the "because of" prong of the statute:

> [Y]ou need not find the defendants actually influenced the granting of the loans to find they received the cash payments because of his [*sic*] actions, decisions, and duties relating to the loans, so long as such influence was the stated purpose in receiving the cash payments.

(Pet. App. 13a.) Petitioners contend (see 81-1487 Pet. 14-16, 18; 81-1490 Pet. 18) that conviction under the "because of" prong requires proof that the accused actually did something in exchange for the payment he solicited, received, or agreed to receive. However, petitioners' construction of the statute is contrary to its plain language and is not supported by the legislative history or by any judicial decision.

a. As this Court recently noted (*United States* v. *Turkette*, 452 U.S. 576, 580 (1981) (citation omitted):

> In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive."

Here, petitioners have not even attempted to reconcile their interpretation of 18 U.S.C. 1954 with the unambiguous meaning of its words. In common usage, however, a person may certainly be said to have solicited, received or agreed to receive a payment "because of * * * [his] actions, decisions, or other duties" even though he has not actually done anything in exchange for the payment. This is so whenever the payment is made on account of the person's position of influence with the fund.

b. Petitioners' interpretation of 18 U.S.C. 1954 is also contrary to Congress' clear intent. 18 U.S.C. 1954 was enacted to curb widespread abuses in the administration of union welfare and pension funds, including "embezzlement, fictitious fees, collusion, insurance kickbacks, exorbitant insurance charges, and other forms of breaches of fiduciary responsibility, looting and dishonesty." S. Rep. No. 908, 87th Cong., 1st Sess. 4 (1961). See also H.R. Rep. No. 998, 87th Cong., 1st Sess. 1-5 (1961). Congress was aware that such abuses are often "highly sophisticated and effective." See S. Rep. No. 908, *supra*, at 14. Congress' broad remedial objectives would be frustrated if the portion of 18 U.S.C. 1954 at issue here were confined to cases in which a payoff could be linked to a specific, consummated quid pro quo. More subtle breaches of fiduciary duties, such as the solicitation or acceptance of gratuities because of the recipient's general responsibilities, are equally within the statute's intended scope.

Petitioners' interpretation is also incompatible with Congress' intent to protect the finances of union welfare and pension funds. See S. Rep. No. 908, *supra*, at 4, 7, 10; H.R. Rep. No. 998, *supra*, at 1, 4, 5. First, the solicitation or acceptance of gratuities by persons associated with such funds tends to affect the manner in which those persons exercise their fiduciary duties. As a result, critical financial decisions may be influenced by improper factors. Second, such abuses may harm a particular fund by undermining confidence in the reliability and integrity of its management. Finally, when persons connected with such funds obtain unauthorized personal gain by virtue of their positions, they are thereby in effect taking property that rightfully belongs to the fund itself. Here, petitioners' unauthorized gain totalled $360,000.

Not only is the lower courts' interpretation of 18 U.S.C. 1954 necessary to protect the financial security of union pension and welfare plans, but it also takes into account Congress' concern about the financial effect that huge union welfare and pension plans may have upon the national economy. See H.R. Rep. No. 998, *supra*, at 1-4; S. Rep. No. 908, *supra*, at 4. Thus, the lower courts' interpretation prohibits the subtle or not-so-subtle form of extortion that would inevitably result from the solicitation or acceptance of gratuities by persons in a position to influence a pension fund's decisions. And it helps to ensure fair and equal treatment of all persons dealing with the fund.

c. Although previous decisions construing 18 U.S.C. 1954 have not addressed the issue presented here, the lower courts' interpretation of Section 1954 in this case is plainly correct in light of the use of the same key language in the official bribery statute, 18 U.S.C. 201, which was reenacted and expanded to cover gratuities by the same Congress that passed 18 U.S.C. 1954. Subsection 201(c)(1) makes it illegal for a public official or a person selected to be a public official to ask, demand, exact, solicit, seek, accept, receive, or agree to receive anything of value in return for "being influenced in his performance of any official act." At the same time, subsection 201(g) separately proscribes the solicitation or receipt of anything of value "because of" any official act performed or to be performed. The purpose of this distinction is to make clear that receipt of gratuities is proscribed by Section 201(g) even without proof that the payment influenced any official act, as the courts have uniformly held. See *United States* v. *Niederberger*, 580 F. 2d 63, 68-69 (3d Cir.), cert. denied, 439 U.S. 980 (1978); *United States* v. *Alessio*, 528 F. 2d 1079, 1082-1083 (9th Cir.), cert. denied, 426 U.S. 948 (1976); *United States* v. *Brewster*, 506 F. 2d 62, 72 (D.C. Cir. 1974); *United*

States v. *Irwin*, 354 F. 2d 192, 196 (2d Cir. 1965), cert. denied, 383 U.S. 967 (1966). In Section 1954, Congress simply combined the bribery and gratuity prohibitions in one provision, expanding it to cover not only payments made "because of" the defendant's acts, but also those made because of his "duties." In sum, the petitioners' arguments, if accepted, would defeat the clear legislative purpose in enacting Section 1954.[4]

2. In a related argument, petitioners maintain (81-1486 Pet. 14-15; 81-1490 Pet. 18-20) that they could not be convicted under 18 U.S.C. 1954 because they had nothing to do with the funds' investments and were incapable of exercising influence concerning such matters. Petitioners' argument is without merit.

a. First, petitioners' argument is contrary to the facts shown at trial. Petitioners' duties as general counsel to the fund were closely related to the investment of the fund's assets. As the court of appeals noted (Pet. App. 5a):

> In their role[s] as counsel, [petitioners] were obligated to consult with the trustees of the Fund when requested, and were required to attend and provide advice at all trustees' meetings. Although the trustees employed an investment manager to oversee investment of the Fund's assets, the trustees retained significant authority over investments. The trustees had the responsibility for selecting the manager and for deciding, when the management contract expired, whether to continue the

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[4]None of the cases upon which petitioners rely is apposite. Those involving 18 U.S.C. 1954 itself (see 81-1486 Pet. 17-18; 81-1490 Pet. 17-18 & nn. 9-10) do not address the issue involved here. Petitioner David Friedland also attacks the decision below (81-1486 Pet. 16-17 & n.5) by criticizing certain Third Circuit cases construing the Hobbs Act, 18 U.S.C. 1951. However, the court of appeals' decision in this case did not rely upon or even mention those cases, and their soundness is consequently irrelevant for present purposes.

manager's services or to seek a replacement. The trustees also had complete discretion to direct particular investments at any time.

Not only did the evidence prove that petitioners were in a position to influence the fund's investments, but it clearly showed that they exercised that influence to arrange the loans to Marlin's companies. Petitioners stated that they could secure the loans and negotiated the loan terms (Pet. App. 6a-7a, 9a). Thereafter the loans were made on the precise terms previously negotiated (*id.* at 7a, 9a). When Marlin expressed doubt that the investment management firm would approve the first loan, petitioner David Friedland told him, "Now stop worrying about it. You've got the loan" (Tr. 195). He added: "If they don't give you the loan, we'll take the fund away from them" (Pet. App. 7a). In addition, there was evidence from which the jury could have properly inferred that petitioner David Friedland influenced the fund's hiring of Unicorn Pension Management Associates as its investment manager (see Pet. App. 5a-7a; Tr. 2645-2646); that in exchange for that lucrative account and other benefits,[5] Unicorn approved the loans to Marlin's companies (*ibid.*); and that one of the fund's two trustees acted in collusion with petitioners (Tr. 264-265, 1241-1242, 1250, 1932).

b. Second, petitioners could still have been convicted under 18 U.S.C. 1954 even if they had lacked actual influence with respect to the fund's investments. As the court of appeals stated (Pet. App. 12a), "[petitioners'] status as counsel to the Fund [was] sufficient to place them in the class of those persons capable of violating * * * § 1954 simply by soliciting or accepting payment * * * by virtue of their status as counsel, under the 'because of' prong * * *."

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[5]For example, the fees received by Unicorn were dramatically higher than those paid its predecessors, two large well-known firms (Tr. 1233, 1238, 1250, 2542, 2659).

Petitioners' argument to the contrary finds no support in the plain language of the statute,[6] in the legislative history or purpose,[7] or in precedent.[8]

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[6]Even if petitioners, as general counsel to the welfare and pension plan, had obtained the payments from Marlin by *falsely* claiming the ability to influence the plan's investments, their conduct would still have violated the statute's clear meaning. They would have received payments "because of * * * [their] actions, decisions, or other duties [as general counsel] relating to [a] question or matter concerning such plan" and because Marlin mistakenly believed that those "actions, decisions, or other duties" enabled petitioners to influence the plan's investments.

[7]First, permitting such a breach of fiduciary responsibility would be inconsistent with Congress' broad objectives in enacting 18 U.S.C. 1954 (see page 7, *supra*).

Second, permitting such conduct might also imperil the financial security of pension funds, contrary to Congress' clear intent (see page 7, *supra*). At the very least, it would permit persons in positions of trust to secure gain rightfully belonging to the fund itself. Moreover, it stands to reason that a person induced to pay a substantial sum in the hope of doing business with the fund will have to take that expenditure into account in framing the terms of his proposal to the fund. Finally, requiring proof of an actual ability to influence would make subtle influence-mongering for pay more difficult to root out.

Third, construing the statute as petitioners propose would frustrate Congress' intent by failing to reach forms of bribery and extortion with potentially significant economic ramifications (see page 8, *supra*).

[8]Petitioners rely (81-1486 Pet. 15, 20; 81-1490 Pet. 20) upon *United States* v. *Muntain*, 610 F. 2d 964, 967-969 (D.C. Cir. 1979). In that case, the court reversed a government official's conviction under 18 U.S.C. 201(g), holding that he had agreed to accept a gratuity because of acts falling outside the scope of his official duties rather than "because of any official act," as that statute requires. By contrast, 18 U.S.C. 1954, while analogous to 18 U.S.C. 201(g) in some respects, does not require a nexus with the defendant's "official act[s]." Instead, 18 U.S.C. 1954 requires a nexus with "actions, decisions, or other duties relating to any question or matter concerning [a union welfare or pension plan]." As previously noted (see pages 5-10, *supra*), that requirement was met in this case. Thus petitioners' reliance upon *Muntain* and other cases involving the "official act" element in 18 U.S.C. 201(g) (see 81-1490 Pet. 20) is misplaced.

3. In still another related argument, petitioner David Friedland maintains (81-1486 Pet. 21-24) that the government's proof at trial constituted a constructive amendment to the indictment. He claims (*ibid.*) that the indictment charged petitioners with actually influencing the granting of the loans to Marlin, whereas the evidence showed only that they "had received the money with the stated purpose of influencing the loan" (*id.* at 24). This argument was not raised in the court of appeals and is in any event patently frivolous.

A constructive amendment of an indictment occurs when the evidence at trial differs so radically from the indictment that the defendant is in effect tried on fundamentally different charges. *Stirone* v. *United States*, 361 U.S. 212, 217 (1960). Under such circumstances, it is impossible to determine whether the grand jury would have been willing to return an indictment on the charges proved at trial (*ibid.*), and the conviction must accordingly be reversed. Any lesser discrepancy between the indictment and the evidence is simply a variance (see *Dunn* v. *United States*, 442 U.S. 100, 105 (1979)) and requires reversal of a conviction only when the defendant's substantial rights are affected. *Kotteakos* v. *United States*, 328 U.S. 750, 757-765 (1946); *Berger* v. *United States*, 295 U.S. 78, 82 (1935).

Here, there was no variance, let alone a constructive amendment of the indictment. The indictment tracked the statutory language and charged that petitioners had solicited and received payments from Marlin "because of and with intent to be influenced with respect to their actions, decisions and duties relating to questions and matters concerning the investment of the assets of the Pension Fund." Thus, there is nothing to suggest that the grand jury did not view as a sufficient basis for indictment under the "because of" prong the fact that petitioners were counsel to the fund and received kickbacks "because of that status, which gave

them at least ostensible power to exercise influence" (Pet. App. 14a). On the contrary, since the grand jury employed the language of the statute, it must be presumed to have meant what that language signifies.[9]

4. Petitioners maintain (81-1486 Pet. 28-30; 81-1490 Pet. 21-23) that an evidentiary hearing should have been held to determine whether the government breached its obligation to preserve discoverable evidence that came into its possession during the course of the criminal investigation. See *United States* v. *Augenblick*, 393 U.S. 348, 355-356 (1969). As the court of appeals concluded (Pet. App. 16a), however, no such hearing was required in this case "[b]ecause [petitioners] failed to make any showing that the evidence sought ever existed or was relevant to the instant proceeding." Further review of this essentially factual determination is not warranted.

The evidence in question falls into two categories: (1) Barry Marlin's personal financial records; and (2) the records of the First Kensington Bank of the Cayman

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[9]In arguing that the portion of the indictment in question was predicated solely upon the theory that petitioners actually arranged for the loans to Marlin, petitioner relies (81-1486 Pet. 23) upon unspecified evidentiary proffers made by the government before trial and unspecified statements made at trial. Such proffers and statements, however, are obviously not part of the indictment. Moreover, it was always the government's theory that petitioners solicited and received kickbacks "because of [their] status [as counsel to the fund], which gave them at least ostensible power to exercise influence" (Pet. App. 14a), and we doubt that there is anything to the contrary in the unspecified proffers and statements upon which petitioner relies. To be sure, the government always maintained that petitioners in fact actually influenced the granting of the loans, and that theory was amply supported by the evidence at trial. However, the government never took the position that proof of such actual influence was essential for conviction under the "because of" prong. Thus, not only was there no constructive amendment of the indictment and no variance between the indictment and the evidence, but there was no significant modification of the government's theory of this case.

Islands (see Pet. App. 15a). As the court of appeals noted (*id.* at 15a-16a): "The only support for [petitioner's] motion with respect to Marlin's personal record is the bare inference appellants would draw from the presence of empty, labeled file folders, coupled with Marlin's alleged 'mania' for record-keeping. [Petitioners] presented no evidence tending to show that the file folders were not empty when the government gained possession of them."[10] The remaining evidence—the records of the First Kensington Bank—were obtained by the Postal Inspection Service during its investigation of Marlin and were routinely discarded after Marlin was sentenced and long before the criminal investigation of petitioners began (*id.* at 42a n.11; C.A. Supp. App. 76b, 207b, 490b-491b). Moreover, as the district court noted, additional copies of those records were in the possession of counsel subsequently retained by the pension fund (see Pet. App. 42a n.11) and could therefore have been subpoenaed or examined by petitioners. Finally, as the court of appeals concluded (Pet. App. 16a), petitioners

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[10]Moreover, petitioners' pretrial proffer failed even to show that the evidence in question was missing. Defense counsel declined to search Marlin's voluminous business records in an effort to find the allegedly missing documents (see C.A. Supp. App. 8b). Furthermore, petitioners' theory was that Marlin himself or someone acting on his behalf removed the documents at some time between January and April 1979 while they were in the custody of the private attorney appointed as the receiver for Marlin's various companies (see C.A. App. A101). However, not only was it unlikely that Marlin could have removed the documents—he was in handcuffs and belly chains and was accompanied by United States Marshals during his visits (C.A. Supp. App. 209b-214b; C.A. App. A106 n.6)—but at the time in question, the criminal investigation of petitioners had not begun, the records were not in government custody, and Marlin was neither an agent of the government nor even a cooperating witness.

failed to make any showing that the records were "relevant" to their defense.[11]

Petitioner Jacob Friedland contends (81-1490 Pet. 22-23) that this case presents an important unresolved question, *i.e.*, "the quantum of preliminary showing" required in this context before an evidentiary hearing must be held. Here, however, petitioners "failed to make *any* showing that the evidence sought ever existed or was relevant to the instant proceeding" (emphasis added) (Pet. App. 16a). Thus, under any reasonable standard, a hearing was unnecessary.[12]

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[11]Petitioners' theories concerning the possible relevance of these records are far-fetched. For example, petitioner David Friedland contends (81-1486 Pet. 30) that the records would have shown the amount of interest earned by petitioners' funds while on deposit in England. However, the records of the two London banks in which the funds were deposited proved the exact amount of interest earned (Govt. Exhs. 60, 60B-60F, 93A, 93C). Petitioner Jacob Friedland argues (81-1490 Pet. 12) that the records were relevant to show that Marlin misappropriated the loan proceeds—a fact not contested by the government—and that "the alleged kickbacks from [petitioners] were in fact recorded as still part of Marlin's accounts in the First Kensington Bank." However, the government never contended that Marlin withdrew the kickback money from that bank. Although he had promised petitioners that he would not do so, Marlin actually raised the funds in the United States, thereby creating a trail of documentary evidence that was introduced at trial.

[12]Petitioner Jacob Friedland also maintains (81-1490 Pet. 23) that the court of appeals' decision conflicts with *United States* v. *Butler*, 499 F. 2d 1006 (D.C. Cir. 1974), and *United States* v. *Lieberman*, 608 F. 2d 889 (1st Cir. 1979), cert. denied, 444 U.S. 1019 (1980). Both those cases, however, are clearly distinguishable. In *Butler*, a hearing was required, but there was strong reason to believe that the evidence in question once existed, disappeared after the criminal investigation of the accused had begun, was lost while in the government's possession or was destroyed by a government agent, and was relevant to the charges in question. As noted (see page 14 & note 10, *supra*), those factors are absent here. In *Lieberman*, a hearing was held in an effort to reconstruct portions of hearings held off the record. Here, there is no suggestion that the "evidence" at issue, much of which may never have existed, could be similarly reconstructed.

5. Petitioner David Friedland argues (81-1487 Pet. 24-28) that the counts charging him with income tax violations were improperly joined wtth the remainder of the indictment and that a severance should have been granted. His argument lacks merit.

All the counts of the indictment were properly joined because they were "based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Fed. R. Crim. P. 8(a). All the offenses formed part of the same scheme or plan devised and carried out by petitioners and Marlin.

Whether to grant a severance under Fed. R. Crim. P. 14 lies within the discretion of the trial court and is reversible only for a clear abuse of discretion. See, *e.g.*, *Opper* v. *United States*, 348 U.S. 84, 95 (1954); *United States* v. *Salomon*, 609 F. 2d 1172, 1175 (5th Cir. 1980); *United States* v. *Lyles*, 593 F. 2d 182, 189-190 (2d Cir.), cert. denied, 440 U.S. 972, 975, and 444 U.S. 847 (1979). Here, the district court exercised its discretion properly, because the same evidence would have been admissible at separate trials. See, *e.g.*, *Holmes* v. *Gray*, 526 F. 2d 622, 625-626 (7th Cir. 1975); *United States* v. *Bragan*, 499 F. 2d 1376, 1380 (4th Cir. 1974); *United States* v. *Williamson*, 482 F. 2d 508, 511 (5th Cir. 1973).

Petitioner contends (81-1486 Pet. 25, 27-28) that Marlin's testimony regarding petitioners' Swiss bank account related only to the tax charges and was not properly admissible to prove the conspiracy to violate 18 U.S.C. 1954. However, that testimony was relevant to the non-tax charges for two reasons. As the court of appeals stated:

> Marlin's familiarity with the secret account supports his testimony that appellants had discussed with him their plan to use the account to effectuate future

> schemes involving pension plan funds. It also tends to show, as the Government contended it would, a close association between appellants and Marlin which supports the conspiracy conviction.

Pet. App. 19a-20a.[13]

Nor would exclusion of the evidence have been required, in a trial limited to the non-tax charges, under Fed. R. Evid. 403 on the ground that "its probative value [was] substantially outweighed by the danger of unfair prejudice." A trial court's ruling under Rule 403 must be affirmed unless arbitrary or irrational. *United States* v. *Alessandrello*, 637 F. 2d 133, 146 (3d Cir. 1980); *United States* v. *Ford*, 632 F. 2d 1354, 1377 (9th Cir. 1980); *United States* v. *Masters*, 622 F. 2d 83, 88 (4th Cir. 1980). In this case, in determining whether to admit the evidence with respect to the non-tax counts, "the trial court carefully considered whether the evidence was sufficiently prejudicial to justify its exclusion" and its ruling "was certainly not arbitrary or irrational" (Pet. App. 20a).[14] Thus, the evidence was properly admitted, and petitioners' severance motion was correctly denied.

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[13]Petitioner inaccurately suggests (81-1486 Pet. 25, 27) that the district court did not rule that the evidence was relevant on the former ground. Petitioner creates a misleading impression by quoting without any citation to the record (81-1486 Pet. 25) a statement made by the trial judge before he understood the connection between the conspiracy to violate 18 U.S.C. 1954 and the information furnished to Marlin by petitioners regarding their Swiss account. Eventually, the trial judge found the evidence relevant on both grounds noted above (see C.A. Supp. App. 148b-157b).

[14]Petitioner contends (81-1486 Pet. 28) that a limiting instruction should have been given regarding this evidence, but no such instruction was requested at trial. However, the trial court did instruct the jury that maintaining such an account was lawful, proper, and appropriate (C.A. Supp. App. 404b).

6. Petitioner Jacob Friedland contends (81-1490 Pet. 23-26) that certain exhibits sent to the jury room were not admitted into evidence and that the court of appeals applied an erroneous standard in concluding that the jury's access to those exhibits did not require reversal of his conviction. His argument is invalid for at least two reasons.

First, petitioner simply ignores one of the two alternative grounds upon which the court of appeals' decision was based, *viz.*, that "the exhibits in question * * * had been formally and properly admitted without objection" (Pet. App. 17a). It is true, as the court of appeals recognized (*id.* at 18a), that the district court subsequently excluded a category of evidence into which portions of those exhibits apparently fell, but those exhibits were not mentioned when the court made that ruling, and the exhibits were never stricken from the record (*ibid.*). Consequently, as the court of appeals implicitly concluded (*id.* at 17a-18a), the exhibits remained in evidence, and their presence in the jury room was not error. The court of appeals' decision is correct and does not conflict with prior precedent. Moreover, these unusual facts distinguish this case from all those cited by petitioners.

Second, even if the exhibits were not properly in evidence, the court of appeals correctly concluded (Pet. App. 18a-19a) that, absent "plain error," a defendant's conviction may not be reversed where, as here, the defense attorneys examine all the exhibits before they are sent to the jury room and certify that no improper exhibits have been included. Under such circumstances, defense counsel's failure to point out any exhibits not in evidence "may well constitute a waiver." *United States* v. *Strassman*, 241 F. 2d 784, 786 (2d Cir. 1957). See also *United States* v. *Camporeale*, 515 F. 2d 184, 188 (2d Cir. 1975); *United States* v. *Bishop*, 492 F. 2d 1361, 1365 n.5 (8th Cir.), cert. denied, 419 U.S. 833 (1974); *United States* v. *Burket*, 480 F. 2d 568,

571 (2d Cir. 1973); *United States* v. *Yoppolo*, 435 F. 2d 625, 627 (6th Cir. 1970). Certainly, a defendant's conviction should not be reversed under such circumstances unless the exhibits were highly prejudicial. See Fed. R. Crim. P. 51, 52(b); *United States* v. *Camporeale, supra*, 515 F. 2d at 188. Here, by contrast, both lower courts concluded that the exhibits could not have prejudiced petitioners (Pet. App. 18a-19a; C.A. Supp. App. 73b, 116b-117b, 119b-121b).[15]

Petitioner contends (81-1490 Pet. 24-25) that even where defense counsel screens the exhibits in advance, reversal is required if the jury's consideration of exhibits not in evidence creates the "slightest possibility" of prejudice. However, petitioner has cited no case holding or stating that that standard or any similar test is applicable where such screening takes place.[16]

7. Finally, petitioner Jacob Friedland asserts (81-1490 Pet. 26) that the count of the indictment charging him with endeavoring to obstruct justice was fatally defective. This

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[15]The exhibits were microfilms of credit card bills and charge slips showing expenditures of approximately $2500 (Govt. Exh. 77A and 77C). After the exhibits were admitted, the district court ruled that evidence of petitioners' unexplained acquisition of wealth would not be received (C.A. Supp. App. 346b). While some of the expenditures shown on the exhibits were admissible on that ground alone, others were admissible for other purposes and were therefore unaffected by the court's ruling. In any event, the district court concluded that the exhibits could not have prejudiced petitioners because the expenditures shown were relatively small and because other evidence clearly portrayed the defendants' affluent lifestyle (C.A. Supp. App. 73b, 116b-117b, 119b-121b). The court of appeals concurred (Pet. App. 18a-19a).

[16]Indeed, in *Dallago* v. *United States*, 427 F. 2d 546 (D.C. Cir. 1969), upon which petitioner relies (81-1490 Pet. 24), the court stated (427 F. 2d at 554) that where counsel review the exhibits before they are sent to the jury room, "[s]uch an arrangement * * * would obligate defense counsel to make his objections to unculled prejudicial or extraneous matter in Government exhibits clearly and timely known."

claim was carefully considered and rejected by the court of appeals (see Pet. App. 21a-22a). We rely upon that court's analysis.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1982

DOJ-1982-05